

Sawyer of Napa, Inc. and Victor M. Camacho and Pacific Northwest District Council of the International Ladies Garment Workers' Union, AFL-CIO. Cases 20-CA-22399 and 20-CA-22402

September 28, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On November 8, 1989, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sawyer of Napa, Inc., Napa, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In agreeing with the judge that the Respondent violated Sec. 8(a)(1) by discharging Victor Camacho for engaging in protected concerted activity, Member Oviatt notes that the Respondent solicited a concerted response from Camacho and Gonzola Zamora when it jointly approached these employees and threatened them with discharge if neither performed overtime work.

Boren Chertkov, for the General Counsel.

George J. Tichy II, Robert K. Carrol, and Evelyn Crane, Esqs. (Littler, Mendelson, Fastiff & Tichy), for the Respondent.

Peter Olney, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This consolidated proceeding, in which a hearing was held on May 22-25, 1989, is based upon unfair labor practice charges filed on December 22, 1988, against Sawyer of Napa, Inc. (Respondent) by Victor M. Camacho in Case 20-CA-22399 and by Pacific Northwest District Council of the International Ladies Garment Workers' Union, AFL-CIO (Union) in Case 20-CA-22402, and upon a consolidated complaint issued on February 27, 1989, by the Regional Director for Region 20 of the National Labor Relations Board (Board), on behalf of the Board's General Counsel, alleging

that Respondent was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act).

More specifically the consolidated complaint alleges that Respondent violated the Act, as follows: violated Section 8(a)(1) by discharging Victor Camacho on October 24, 1988, because on October 21, 1988, Camacho "concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees" or, in the alternative, because Respondent "believed that Camacho engaged" in such conduct; and, violated Section 8(a)(1) and (3) by discharging Francisco Nunez on November 8, 1988, and Salvador Guzman on November 9, 1988, because they joined, supported, or assisted the Union. Respondent filed an answer to the consolidated complaint in which it denied committing the alleged unfair labor practices.¹

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Victor Camacho's Discharge

1. The evidence

Victor Camacho was employed by Respondent in its shipping and receiving department from August 10, 1988, until October 24, 1988,² when he was discharged. During the time material the other employees employed in this department were Gonzola Zamora, Mike Steincamp, and Peggy Zerba, all of whom were supervised by Jeanne Trumble, Respondent's manager of sales and shipping, who reported to Dave Davis, Respondent's production superintendent.

Respondent's new hires have a 90-day introductory period during which they received none of the fringe benefits, i.e., holiday pay, sick leave, medical insurance, etc., afforded regular employees. In August, during his job interview, Camacho was informed by Sandra Hood, Respondent's personnel manager, that for the first 90 days of his employment he would be a probationary employee and during that period could be fired for any reason. Plant Superintendent Davis also advised him of this.

On the subject of overtime, the handbook which Respondent distributes to its employees states that, "[o]ccasionally, you will be required to perform overtime work necessary to meet Company production requirements or schedules." In his August job interview, Camacho was advised by Personnel Manager Hood that his regular hours of employment would be from 7 a.m. to 3:30 p.m., but there would be regular overtime, as required by the job, and it would be necessary for him to work overtime if he accepted the job, "because overtime work was mandatory." She also told him that if employees refused to work overtime "they would be fired."

¹ In its answer Respondent, a corporation with its place of business in Napa, California, admits it meets one of the Board's applicable discretionary jurisdictional standards and is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Also, at the start of the hearing, Respondent admitted that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

² All dates hereinafter, unless otherwise specified, refer to the year 1988.

(Tr. 117 LL. 16–18.) During his subsequent preemployment interview with Production Superintendent Davis and Shipping Department Manager Trumble, Camacho was informed by Davis that in the department where he would be working, “overtime was a fact of life, we work until the work is done” because, as Davis explained to Camacho, if Respondent failed “to get its goods out” its customers would not be interested in buying them.

During the time material the regular hours of work for the employees employed in the shipping and receiving department were 7 a.m. to 3:30 p.m. However, overtime work was a way of life in that department for employees Zamora, Camacho, and Steincamp. They were regularly scheduled to work overtime. Supervisor Trumble posted a calendar on the wall of the department and on this calendar marked the names of Zamora, Camacho, and Steincamp on the dates they were scheduled to work overtime and, in doing so, scheduled them for overtime work on a rotating basis. But if the employee scheduled to work overtime on a particular day was not available that day, then one of the other employees in the department was required to stay and work that overtime, unless excused by Trumble. (Tr. 278, 744–746.)

On October 21, during the morning, Peggy Zerba told Camacho and Zamora that Trumble had stated that both of them had to come to work the next day, a Saturday, which was not a scheduled workday. Camacho informed Zerba that he had already made a personal commitment to go out of town on Saturday which prevented him from working. However, later that morning when Trumble personally told him he had to come to work on Saturday and asked if it was “okay,” Camacho replied, “okay, that’s fine.”

On October 21 Steincamp was the shipping/ receiving department employee scheduled to work the regular overtime that day, which was loading the Company’s truck, Camacho and Zamora having already been scheduled to work overtime earlier that week. During the afternoon of October 21 Trumble sent Steincamp away from Respondent’s facility on an errand and he did not return until approximately 3:45 p.m. or 4 p.m. He returned early enough to perform his overtime duty of loading the company truck, but at the time he left it was not certain whether he would return in time to perform his overtime duty.

On October 21, at approximately 3:15 p.m., shipping/receiving department employee Zerba spoke to Camacho and Zamora in the department and told them Trumble wanted one of them to stay and work overtime to load the company truck. Zamora answered he did not intend to stay because it was not his day to work overtime. Camacho either stated, “it’s not my day to stay either” or remained silent. Zerba then left.³

Immediately after Zerba left, Zamora told Camacho he did not intend to stay and work overtime because he stayed the day before and did not intend to stay again because it was not his turn to do so. Camacho told Zamora he agreed it was Steincamp’s turn to stay and work overtime. Zamora then mentioned that he did not know why they were even needed to work overtime because Steincamp’s errand should not keep him away from the shipping/receiving department for that long a period of time. Camacho indicated he agreed with

Zamora that Steincamp would return in time to load the company truck.⁴

Trumble testified that she, not Zerba, went to the shipping department on October 21 and spoke to Zamora and Camacho about working overtime and did this at approximately 2:30 p.m. She testified she told Camacho and Zamora that one of them must stay and work overtime to load the truck because Steincamp had to leave and, further testified, when she asked Camacho and Zamora if they understood what she was saying,⁵ both nodded their heads in the affirmative and said nothing. I rejected Trumble’s aforesaid testimony because her testimonial demeanor was poor and because her testimony conflicted with a memo she prepared on October 21 for Plant Superintendent Davis, in which she described what had occurred that day concerning Camacho’s and Zamora’s refusal to work overtime. In the memo, described in detail *infra*, she stated it was not until 3:20 p.m. that she learned Steincamp might not be available to work overtime and further stated it was Steincamp who, in the presence of Zerba, told Camacho and Zamora that one of them would have to stay and load the truck. Thus, the memo contradicts Trumble’s testimony and Trumble failed to explain this contradiction.

On October 21, shortly after Camacho and Zamora had punched out from work at 3:30 p.m., Trumble tried unsuccessfully to get one of them to stay and work overtime to load the truck. Camacho’s, Zamora’s and Trumble’s testimony about this event differs in certain significant respects. Their testimony has been set out and evaluated below.

Camacho testified that as he and Zamora were walking across the company yard to their automobiles that Trumble called out and stated that one of them would have to stay and work overtime, that Camacho remained silent but Zamora replied he did not intend to stay because of it was not his turn to stay and work overtime and explained to Trumble that it was Steincamp’s turn and not Camacho’s nor Zamora’s turn to stay. Trumble, Camacho testified, responded by threatening them with discharge if one of them did not stay, and Zamora ignored this threat and continued to walk to his automobile, but Camacho, without saying anything to Trumble, went to Respondent’s personnel office. Camacho testified his reason for not saying anything to Trumble and going to the personnel office was, “because I see [Trumble] real mad I think she’s crying and she’s yelling and I say I want to fix this problem because she is not supposed to call at the people like that, real dirty. She’s not supposed to . . . I’m a person.” In this regard, Camacho testified Trumble was upset when she spoke to him and Zamora, that she spoke to them in an angry manner, and yelled and used “dirty” language such as “god damn it.”

Zamora testified that as he and Camacho walked across the company yard to their automobiles he realized he had left something in the shipping/receiving department, so he went back to the department for a moment and when he returned to the yard he observed Trumble talking to Camacho. He fur-

³This description of Zerba’s conversation with Camacho and Zamora is based upon Zamora’s credible testimony. Camacho was not questioned about this conversation and Zerba did not testify.

⁴This description of Zamora’s conversation with Camacho is based upon Zamora’s credible testimony. Camacho was not questioned about this conversation. Although I have not credited Zamora’s testimony in certain respects, *infra*, I note that his testimonial demeanor was good when he testified about his conversation with Zerba and his subsequent conversation with Camacho, when they discussed Trumble’s instruction.

⁵The native language of Camacho and Zamora is Spanish. Trumble, who does not speak Spanish, spoke to them in English.

ther testified that when he came to where he could hear what was being said, he observed that Trumble was “very upset” and was speaking to Camacho in a loud tone of voice and in a threatening manner, and testified he heard Trumble state to Camacho, “something like one of you has to stay . . . [o]ne of you has got to stay If not . . . one of you is not going to be here Monday,” and that Camacho answered by stating, “something like, I’ll stay. It’s not that I don’t want to stay. I’ll stay.” Then, according to Zamora, Zamora spoke up and told Trumble it was not necessary for either Zamora or Camacho to work overtime because Steincamp would return shortly, at which point Trumble and Camacho walked back toward the shipping/receiving department and Zamora continued on to his automobile.

Trumble testified that at 3:30 p.m. employee Zerba told her no one had stayed to load the truck, so Trumble went out onto the shipping/receiving department’s loading dock and observed Zamora and Camacho at a distance walking across the company yard toward where their automobiles were parked. Trumble caught their attention by yelling out their names. According to Trumble, in response to her call, Zamora turned around and hollered out something which she could not hear and he resumed walking toward his automobile, whereas Camacho walked back to where Trumble was standing and they had a conversation. Trumble testified she told Camacho that someone had to stay and load the truck, and Camacho replied by stating he was not going to stay and was going to talk to personnel and turned and walked toward the personnel office and Trumble went to her office and telephoned Plant Superintendent Davis. Trumble admits she was upset when she spoke to Camacho but denies she raised her voice or threatened to discharge anyone. I reject her testimony in its entirety because her testimonial demeanor was poor and because, as I have found supra, she falsely testified about the closely related matter of a conversation she supposedly had with Zamora and Camacho earlier that day about working overtime. Moreover, her testimony about the manner in which Zamora conducted himself is contradicted by the contents of the October 21 memo she prepared immediately after this incident in which, in response to Superintendent Davis’ request that she reduce into writing what had occurred, Trumble typed the following:

At approximately 3:20 today, Mike Steincamp told me he was going to go get the keys and have the car washed for the trip scheduled for Saturday morning. He said he had told Victor [Camacho] and Gonzolo [Zamora] that one of them would have to stay for the trucks that were still to come in. Peggy [Zerba] said she witnessed this.

At 3:30 Peggy came to me and said that both Victor and Gonzolo were mad about staying and left.

I ran outside and caught both of them on the way out. I told them that one of them would have to stay. They both wanted to argue with me. Gonzolo left and Victor said he was going to the office.

I them [sic] spoke to Dave [Davis] and he said he would take care of it.

I find it difficult to believe that if, after having called out to Camacho and Zamora to get their attention, Zamora had responded simply by yelling out something which Trumble

could not hear and kept walking toward his car, that Trumble would have stated in her contemporaneous memo that, “I told them that one of them would have to stay. They both wanted to argue with me.” Trumble did not explain why she wrote this in her memo.

Regarding the conflict between Zamora’s and Camacho’s testimony concerning their encounter with Trumble, I credit Camacho’s account because his testimonial demeanor, which was good, was better than Zamora’s. I also considered that Zamora, who at the time of the hearing had been employed by Respondent for 10 years, was not a disinterested witness. In this regard, as described infra, Zamora, like Camacho, was initially suspended for his refusal to work the October 21 overtime, but unlike Camacho, who was discharged, received only a 1-day suspension. The difference in their discipline was due to Zamora’s long tenure of employment without having been previously disciplined and because Respondent gave Zamora the benefit of the doubt, namely it accepted Zamora’s claim that he believed Camacho on October 21 intended to perform the overtime work when he observed Camacho walk back toward the building. Thus, it was in Zamora’s interest to testify that on October 21 he heard Camacho tell Trumble that Camacho would stay to load the truck. Moreover, not only is this testimony contrary to both Camacho’s and Trumble’s testimony, it is inherently incredible. For, if Camacho told Trumble he would stay and work overtime, there would have been no reason for Trumble to have immediately complained to Superintendent Davis about Camacho’s and Zamora’s refusal to work overtime, rather, she would have gone back to preparing for her business trip and Camacho would have presumably gone about the business of loading the company truck. I am persuaded Zamora testified as he did in order to support the explanation he gave to Respondent, which saved his job, that the reason he did not work the overtime was that he believed Camacho had decided to stay and work. This conclusion is further buttressed by Zamora’s failure, as described in detail infra, to inform Personnel Manager Hood that he heard Camacho tell Trumble that Camacho would stay to load the truck.

On October 21, after her unsuccessful effort to persuade either Camacho or Zamora to stay and work overtime, Trumble went back immediately to her office and telephoned Plant Superintendent Davis and informed him she had told Zamora and Camacho she needed one of them to work overtime that day, that both of them had left, and she did not have anyone to load the company truck, and asked Davis to come to her office to talk to her about the problem. Davis went immediately to Trumble’s office. Trumble told him she had spoken to Zamora and Camacho as they were leaving the plant and told them she needed one of them to stay, that Zamora had refused to stay and told her he had stayed the night before to load the truck,⁶ and that Camacho had argued with her and then walked off. Trumble explained to Davis she was in a hurry to leave the plant because she was in the process of getting things ready for a business trip to New York City on which she would embark the next day, and asked if Davis would take care of this problem. Davis

⁶ Although the transcript at this point is garbled, it is plain from the context that Davis, in his testimony, was referring to Zamora.

agreed.⁷ However, before Trumble left the facility, in response to Davis' request that she write a memo describing what had occurred, she typed and signed the memo, which has been described in detail *supra*, and on her way out of the plant on October 21 at approximately 4 or 4:15 p.m. she gave it to Personnel Manager Sandra Hood.⁸

In the meantime, at approximately 3:35 or 3:40 p.m., Camacho had gone to Respondent's personnel office and informed Personnel Manager Hood's secretary that he wanted to speak to Hood about a problem he and Zamora had about working overtime. Hood's secretary left and in a few minutes returned with Hood. In the following conversation, Camacho spoke in Spanish, Hood in English, and Hood's secretary, who was bilingual, translated. Camacho told Hood that Trumble had told him and Zamora that one of them had to stay and work overtime, that Zamora had asked Trumble to check the calendar because it was not his turn to work overtime, but that Trumble told them she did not care and warned that if one of them did not stay she would fire them. Camacho complained to Hood that Trumble seemed to be on the verge of crying, that she had yelled at them and used obscene language. Hood replied she was going to speak to Superintendent Davis and told Camacho to wait in another office.⁹

Hood then spoke to Davis, who had come to her office. Davis' testimony concerning their conversation follows. Davis told Hood that Trumble had told him she had informed Camacho and Zamora that one of them would have to stay late and load the truck because Steincamp was away doing an errand, but that Zamora and Camacho both refused to stay and did not stay. Davis told Hood he thought Camacho should be immediately discharged for insubordination. Hood responded that since Zamora was also involved she thought

both of them should be suspended, pending an investigation. Davis agreed and Hood left. I note that inasmuch as Hood's meeting with Davis did not occur until approximately one-half hour after Hood at approximately 3:45 p.m. had spoken to Davis over the telephone, that when they met Hood must have already had in her possession Trumble's above-described October 21 memo. Hood testified that she and Davis understood from Hood's memo that both Camacho and Zamora had been asked by Trumble to work overtime and that both of them had refused.

Eventually, at approximately 4:30 p.m., Hood returned to where Camacho was waiting and, using her secretary as a translator, told Camacho that he and Zamora were suspended pending an investigation and she would contact him during the following week to let him know the results of the investigation. Camacho asked for something in writing. Hood immediately typed and signed a memo, addressed to Camacho, which stated: "Effective immediately you are suspended from your employment with [Respondent] pending investigation by Management about insubordination to your immediate supervisor Jeanne Trumble. You were told that either you or Gonzola Zamora were needed to stay to complete some work and both of you started to argue and left anyway."

On October 21, immediately after Zamora was notified of his suspension, Hood telephoned Zamora at his home and told him he had been suspended from work pending an investigation. Zamora asked why he was being suspended. Hood told him he had refused to obey an order given by Trumble to work overtime loading the truck. Zamora replied he had observed Camacho and Trumble walking back to the shipping/receiving department and figured Camacho was going to stay and that the problem had been taken care of. Hood stated she had not known his story previously and told him she would discuss the matter further with Davis and on Monday, October 24, would notify him about his employment status.¹⁰

On Monday, October 24, Davis conferred with Hood about Camacho's and Zamora's status. Hood told him she had spoken to Zamora and that Zamora had told her he had been under the impression that having stayed and walked back toward the loading dock on October 21, that Camacho intended to load the truck, so Zamora had gone home. Davis responded by telling Hood that because Zamora had been with the Company for a long time, without any prior disciplinary problems, and because Zamora was contending that he honestly believed Camacho had stayed to load the truck, that a 1-day suspension was sufficient discipline for Zamora and he could return to work October 25. But with respect to Camacho's status, Davis told Hood he had not changed his mind, that he believed Camacho should be discharged for insubordination. Hood stated she agreed.¹¹

⁷The aforesaid description of Trumble's conversations with Davis is based upon Davis' testimony. Trumble's testimony is at odds with Davis'. Her testimony about her conversations with Davis mirrors her testimony about her previous October 21 conversations with Camacho and Zamora, which I did not credit for reasons set forth *supra*. The failure of Davis to corroborate Trumble reinforces my belief that Trumble was not a credible witness.

⁸I do not credit Hood's testimony that this memo was not given to her until Monday, October 24. As I have found above, Trumble testified that when she left the plant in October 21, at approximately 4 p.m. or 4:15 p.m., she handed the memo personally to Hood and told Hood, "here is the note that I wrote for Dave." Hood failed to testify who it was that supposedly gave her this memo on October 24; it could not have been Trumble inasmuch as by that time Trumble was already in New York on business.

⁹Camacho and Hood testified about this conversation. Hood's secretary did not testify. The above description is based upon Camacho's testimony. Hood testified Camacho complained he did not like the way Trumble had yelled at him and explained to Hood that "there was a situation outside where she was yelling at him where she wanted him to stay to load trucks and there was a problem, and he did not like the way she was yelling at him so he came to the personnel office to complain about her." Hood further testified she told Camacho that if Trumble had yelled at him it was probably because she had a bad day, and Camacho then started to explain to her in more detail what had occurred that day. Hood testified she did not understand Camacho's explanation and that his explanation was interrupted by a telephone call from Superintendent Davis, who informed Hood there was a "problem," so she immediately stopped talking with Camacho and asked him to wait in the next room. I credited Camacho's testimony because his testimonial demeanor, which was good, was better than Hood's, which was poor. I also note Davis testified that when he telephoned Hood he told Hood there was a problem with Camacho and Zamora, explained to Hood that Camacho and Zamora had not remained to load the truck, and testified that Hood responded by informing him that Camacho was at that time speaking to her and that she would call Davis back as soon as she ended her conversation with Camacho. Davis further testified that it was not until approximately one-half hour later that Hood called back and asked him to come to her office to discuss the problem.

¹⁰This description of Hood's conversation with Zamora is based upon a composite of Zamora's and Hood's testimony. I note that neither Zamora nor Hood testified that Zamora told Hood that he had heard Camacho tell Trumble he would stay and work overtime. Rather, Zamora testified he told Hood that, "I saw Victor and Jeanne walking back to the shipping room and I figured that he was going to stay." Hood testified that Zamora told her, "I don't understand what you're telling me because the problem was taken care of . . . Victor did stay."

¹¹This description of Davis' conversation with Hood is based upon a composite of their testimony.

On October 24 Hood telephoned Camacho and told him he had been fired; she told him he had refused to cooperate with his supervisor and that being a probationary employee they had fired him. On the same day Hood filled out a "Personnel Change Order" stating that Camacho had been discharged for "insubordination" because he "refused to cooperate with supervisor during very busy situation . . . still in 90 day training period."

2. Discussion

General Counsel contends that on October 21 Camacho and Zamora concertedly refused to work overtime, that this conduct constituted protected concerted activity encompassed by Section 7 of the Act, and that Respondent suspended Camacho on October 21 and discharged him on October 24 for engaging in this activity, thereby violating Section 8(a)(1) of the Act. Respondent contends Camacho's suspension and discharge did not violate the Act because Camacho did not refuse to work overtime in concert with Zamora, and, even if he did, there is insufficient evidence to establish that Respondent knew this was the situation, and, in any event, a concerted refusal by Camacho and Zamora to work overtime would not have been protected by the Act because overtime work assignments are mandatory. I find, for the reasons below, Respondent violated Section 8(a)(1) by suspending and discharging Camacho because he engaged in protected concerted activity.

The applicable legal principles governing employees' concerted activity in general, as set forth by the Board in *Meyers Industries*, 268 NLRB 493 (1984), and reaffirmed in *Meyers Industries*, 281 NLRB 882 (1986), are as follows (268 NLRB at 497):

In general to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

I find that under *Meyers Industries*, supra, Camacho's refusal to work overtime on October 21 represented concerted activity within the meaning of Section 7 of the Act. Thus, when during the afternoon of October 21 Camacho and Zamora were notified by employee Zerba that Trumble, their department supervisor, wanted either Camacho or Zamora to stay and work overtime to load the truck, Camacho and Zamora discussed the matter and in effect agreed that neither one of them would work overtime that day. Zamora told Camacho he did not intend to stay and work overtime because he had worked overtime the day before, that it was employee Steincamp's turn to work overtime, and that Zamora did not understand why either he or Camacho were needed to work overtime when it appeared Steincamp would return in time to perform the work.¹² Camacho told Zamora

he agreed it was Steincamp's turn to stay and work overtime and stated that he also believed Steincamp would return in time to load the truck. Subsequently, at the end of their regular workday neither Camacho nor Zamora stayed to work overtime; they punched out together and left the shipping/receiving department to go home. When, as they were leaving Respondent's premises, Trumble yelled that one of them would have to stay and work overtime or be fired, Camacho and Zamora refused to obey her. Zamora responded by stating it was not his turn or Camacho's turn to work overtime, that it was Steincamp's turn, and when Trumble threatened Zamora and Camacho with discharge, Zamora ignored the threat and continued on his way home. Likewise, Camacho ignored the threat and instead of obeying Trumble's order, he went to the office of Respondent's personnel manager to complain about Trumble's treatment of himself and Zamora. In short, when initially informed on October 21 that Supervisor Trumble expected one of them to stay and work overtime loading the truck, Camacho and Zamora adopted a common position; they agreed that neither one would work overtime. They continued to maintain this common position when they left the premises that day at the end of the regular workshift and maintained it even after Trumble personally demanded that one of them stay and work overtime and threatened to discharge them if her instruction was not obeyed. These circumstances demonstrate that when Camacho on October 21 refused to work overtime that he acted "with" Zamora and not solely by and on behalf of himself.

In finding that when Camacho refused to work overtime on October 21, he acted in concert with Zamora, I considered that when, on October 21, Personnel Manager Hood informed Zamora that pending an investigation he was suspended because he had refused to work overtime, that Zamora replied by explaining to Hood the reason he had not worked overtime, as requested, was he had been under the impression Camacho intended to stay and work overtime because he observed Camacho walk back toward the plant in the direction of the shipping/receiving department. Zamora's actions, however, belie his excuse. As I have found supra, when informed by employee Zerba that Supervisor Trumble expected Zamora or Camacho to work overtime, Zamora unequivocally indicated he did not intend to work overtime as requested, and when Trumble later that day personally informed Zamora and Camacho that one of them had to stay and work overtime, Zamora responded by again unequivocally indicating to Trumble that he would not work overtime, and when Trumble at this point threatened him and Camacho with discharge, Zamora ignored the threat and left Respondent's premises. Under the circumstances, it is clear that the excuse Zamora later made to Personnel Manager Hood for not working overtime was made in an effort to save Zamora's job and does not correctly reflect Zamora's state of mind at the time Trumble asked him to work overtime. In any event, assuming Zamora did in fact change his mind and intended to work overtime after hearing Trumble's threat of discharge, but did not do so because he believed Camacho intended to stay and work the overtime, it would not convert

¹² Steincamp was scheduled to work overtime October 21 to load the Company's truck. However, earlier that afternoon Steincamp had been sent by Trumble away from the plant on an errand. Since Trumble was not sure

whether Steincamp would return in time to do the overtime work, she decided that either Zamora or Camacho would have to stay to do the work. As noted previously, Steincamp eventually did in fact return in time to perform the overtime work of loading the Company's truck.

Camacho's refusal to work overtime from concerted to individual activity. For, on October 21 when initially informed that Trumble expected one of them to work overtime, Zamora and Camacho adopted the common position that neither one of them would work overtime and continued to maintain this position when they left work that day at the end of their normal workshift and even after Trumble personally demanded that one of them stay and work overtime. Under these circumstances, even if Zamora did in fact abandon this common position after hearing Trumble's threat of discharge, it would be unduly restrictive of Camacho's Section 7 rights to hold that Zamora's change of mind, which was not communicated to Camacho, abruptly converted what had previously been concerted activity into individual activity and deprive Camacho of the Act's protection. As the court in a similar situation stated in *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 579 (7th Cir. 1983):

An employee need not have fellow employees join in every step he takes in order for his actions to qualify as protected concerted activity. . . . Simply because one employee carries a protest further than other employees does not necessarily mean that the more active employee loses the protection of the Act. To hold otherwise would unduly restrict the rights guaranteed by Section 7.

Moreover, since, as I have found *infra*, it was Camacho's and Zamora's concerted refusal to work overtime which provoked Respondent to dismiss Camacho, Zamora's supposed change of mind about working overtime would not deprive Camacho of the protection of the Act he otherwise deserved. See, *NLRB v. Parr Lance Ambulance Service*, *supra* at 579.

I further find that when Respondent suspended and discharged Camacho it knew of the concerted nature of his activity. Thus, on October 21, after Camacho and Zamora refused to obey Supervisor Trumble's request that one of them stay and work overtime, Trumble immediately told Plant Superintendent Davis she had spoken to Camacho and Zamora and had told them she needed one of them to stay and work overtime to load the trucks, and they had both refused to stay. Trumble, at Davis' request, then typed a memo which described what had occurred, and Personnel Manager Hood and Davis considered the memo on October 21 before deciding to suspend Zamora and Camacho. The memo, in pertinent part, states Trumble told Zamora and Camacho that one of them would have to stay and work overtime that day and states that when Trumble was subsequently informed that "both Victor [Camacho] and Gonzola [Zamora] were mad about staying and left, that Trumble "ran outside and caught both of them on the way out [and] told them that one of them would have to stay [and] they both wanted to argue with me [and] Gonzola [Zamora] left and Victor [Camacho] said he was going to the office." Hood and Davis, when they read this memo, understood it to mean that Camacho and Zamora both refused to stay and work overtime. Subsequently on October 21, when Camacho was notified of his suspension he was given a memo signed by Hood which stated Camacho was suspended because he had been insubordinate to Supervisor Trumble because when Trumble told Camacho and Zamora that one of them was needed to stay overtime to complete some work that both of them refused

to work overtime. The foregoing circumstances, when coupled with the fact that on October 21 Respondent simultaneously suspended both Camacho and Zamora for refusing to work overtime that day, establishes that when Respondent suspended and then discharged Camacho it knew of the concerted nature of his refusal to work overtime.

I further find that on October 21 Respondent suspended Camacho because he acted in concert with Zamora on October 21 when they refused to work overtime. Respondent in effect admitted it suspended Camacho because of his aforesaid concerted activity. For, as described in detail *supra*, when Camacho was notified about his suspension he was given a memo signed by Personnel Manager Hood which stated that the reason for his suspension was that when Camacho and Zamora were instructed by their supervisor that one of them would have to work overtime that both Camacho and Zamora refused to work the assigned overtime. Considering this confession; considering the timing of Camacho's suspension, hard on the heels of Respondent's knowledge that Camacho, in concert with Zamora, refused to work overtime; and, considering the simultaneous suspensions of Camacho and Zamora for refusing to work overtime; I find that the General Counsel has established Respondent suspended Camacho on October 21 because on that day he acted in concert with Zamora in refusing to work overtime.

Likewise, I find that on October 24 Respondent discharged Camacho because he acted in concert with Zamora on October 21 when they refused to work overtime. On October 24 Plant Superintendent Davis decided Camacho should be discharged because he had been insubordinate to his supervisor by refusing to work overtime on October 21. Davis testified that his *only* reason for discharging Camacho on October 24 was Camacho's October 21 refusal to work overtime after being told to do so by his supervisor. As I have described in detail *supra*, Camacho was suspended on October 21 pending a further investigation by management. However, while Respondent conducted a further investigation concerning Zamora's involvement in Camacho's and Zamora's refusal to work overtime, there is no evidence of any further investigation concerning Camacho's involvement. Thus, in deciding to discharge Camacho, Davis relied on the information he had in his possession on October 21, when he suspended Camacho. In view of these circumstances and because I have found, *supra*, that Respondent suspended Camacho because on October 21 he acted in concert with Zamora in refusing to work overtime, I find Davis' testimony that his sole reason for discharging Camacho was his refusal to work overtime constitutes an admission that Camacho was discharged because he acted together with Zamora in refusing to work overtime. This admission and the fact that on October 24, at the same time he decided to discharge Camacho, Davis decided to suspend Zamora for one day, October 24, because of his October 21 refusal to work overtime, establishes Respondent discharged Camacho on October 24 because of Camacho's and Zamora's concerted refusal on October 21 to work overtime.¹³

¹³ Davis decided to discipline Zamora for his part in Zamora's and Camacho's concerted refusal to work overtime by suspending him for 1 day, rather than discharging him. As I have found *supra*, Davis' decision to impose a lesser degree of discipline upon Zamora was motivated by the fact that in contrast to Camacho, who was a probationary employee, Zamora had been employed by Respondent for 10 years, without having been previously dis-

Having found that Respondent suspended and discharged Camacho because of his concerted refusal with Zamora on October 21 to work overtime, the remaining issue is whether this is the kind of concerted activity encompassed by Section 7 of the Act. Respondent contends Camacho's and Zamora's concerted refusal to work overtime did not constitute protected concerted activity because the overtime they refused to work was a mandatory overtime work assignment. I agree with Respondent that the overtime involved was mandatory,¹⁴ but find no merit to Respondent's further contention that in view of the mandatory nature of the overtime work assignment that the employees' refusal to work the overtime did not constitute protected concerted activity.

It is settled that employees have the same right to engage in a concerted refusal to work mandatory overtime as they do to engage in a concerted refusal concerning wages or other working conditions. *First National Bank of Omaha v. NLRB*, 413 F.2d 921, 923-925 (8th Cir. 1969), *enfg.* 171 NLRB 1145 (1968); see also *Polytech, Inc.*, 195 NLRB 695 (1972); *J. P. Hamer Lumber Co.*, 241 NLRB 613 (1979); and *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074 (5th Cir. 1979). It is also settled that when employees repeatedly refuse to perform mandatory assigned overtime work or announce their intention to engage in such conduct, that their conduct is unprotected by the Act because it constitutes a recurring or an intermittent partial strike, which amounts to the employees unilaterally determining their conditions of employment. *Graphic Arts International Union Local 13-B*, 252 NLRB 936, 937-938 (1980); *Lake Development Management Co.*, 259 NLRB 791, 796-797 *fn.* 4 (1981). See also *First National Bank of Omaha v. NLRB*, *supra*, 413 F.2d at 924; *Polytech, Inc.*, *supra*, 195 NLRB at 696. But when overtime work is voluntary, a discharge for a concerted refusal to work such overtime in unlawful, even if the employees withhold their services intermittently. *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965); *Jasta Mfg. Co.*, 246 NLRB 48 (1979).

In the instant case Camacho and Zamora refused to work overtime on only one occasion, October 21, and there is no evidence whatsoever that they intended to intermittently refuse to work overtime thereafter. Quite the opposite, on October 21, prior to his refusal to work overtime that day, Camacho had already indicated to the department supervisor that he would work unscheduled overtime the next day, a Saturday, as requested by the supervisor. Under these circumstances, in view of the applicable principles of law set forth *supra*, Camacho's and Zamora's concerted refusal to work overtime on October 21 did not forfeit the protection of the Act, even though it involved a mandatory overtime work assignment.¹⁵

ciplined, and because Zamora had told Personnel Manager Hood that his reason for not staying to work overtime was that he believed Camacho had in fact stayed to work overtime.

¹⁴As I have found *supra*, the employees in Camacho's and Zamora's department were regularly scheduled to work overtime on certain preassigned days of the week, but if an employee scheduled to work overtime on a particular day was not available due to sickness or for some other reason, then one of the other employees was required to stay and work the overtime, unless excused by the department supervisor. In other words, on October 21 when Supervisor Trumble told Camacho and Zamora that one of them would have to substitute for Steincamp, with respect to Steincamp's overtime work, it constituted a mandatory overtime job assignment.

¹⁵The fact that Camacho and Zamora do not appear to have been protesting expressly against a continuing condition or policy of employment does not ne-

Based upon the foregoing I find that Respondent suspended Victor Camacho on October 21 and discharged him on October 24 because he had engaged in concerted activity encompassed by Section 7 of the Act. I therefore further find that by suspending and discharging Camacho, Respondent violated Section 8(a)(1) of the Act.¹⁶

B. The Discharges of Francisco Nunez and Salvador Guzman

1. The evidence

(a) The setting

Respondent converts raw sheep skin hides into a variety of suede products at its plant located in Napa, California. During the time material it employed between 125 and 150 workers.

In the plant's skin finishing department the sheep skins are worked on by employees known as buffers. This work is a very important part of the process by which a sheep skin is finished into a final suede product. The position of buffer is one of Respondent's most skilled and demanding jobs and because of this pays more than most of Respondent's other jobs. Because of the demanding nature of the job, some workers would rather earn less money working at another job. Respondent is also reluctant to transfer or terminate an experienced buffer, who has a satisfactory work record, because due to the skilled and demanding nature of the job, it takes a minimum of 6 weeks and as many as 12 weeks to train a buffer to do the job proficiently. Thus, once an employee is trained and exhibits acceptable buffing skills, Respondent makes every effort to retain that employee as a buffer.

The buffer process begins with the "first buff," where, to remove the excess flesh from the skin, the buffer moves the skin over a wet buffing wheel of coarse grained sand or "grit." The raw sheep skins are not of a consistent quality; some skins need more buffing because of the thickness and toughness of the layer between the skin of the animal and the meat that must be removed, while other skins are leaner and need to be handled more carefully. Each day at 7 a.m., the start of the workshift, the buffers are usually assigned a number of skins to be completed that day. The first buff is generally finished by 10:15 a.m., the start of the morning break period.

cessitate a different result. Here their refusal to work the unscheduled overtime on October 21 occurred when at approximately 15 minutes before the end of their regular workshift the last regular workday of the week, a Friday, they were abruptly told that management expected one of them to stay and work overtime. Whether Camacho's and Zamora's response in refusing to work the overtime is viewed as a concerted protest against what they regarded as unfair treatment—a "one shot" response—or as an implicit demand that Respondent in the future not wait until the very last minute before abruptly informing them that they were required to work unscheduled overtime, their concerted refusal to work the overtime was entitled to the protection of the Act. See *Polytech*, *supra*.

¹⁶I have considered that the complaint does not allege Camacho's October 21 suspension violated the Act, but only that his October 24 discharge violated the Act. However, ruling on the legality of Camacho's suspension does not violate any principles of due process because the legality of his suspension is inextricably intertwined with the legality of his discharge, thus affording Respondent ample notice that the legality of Camacho's suspension would be an essential issue in this proceeding. Moreover, the legality of Camacho's suspension was fully litigated.

Respondent, which has been in business for a number of years, prior to 1988 buffed its sheep skins only once. Early in 1988, to improve the quality of its product, Respondent instituted "two-stage buffing." The second stage of the buffing process, known as the second buff, is where the buffer once again moves the skin over the buffing wheel, this time using a finer grit to remove the remaining excess flesh from the hide. The second buff must be done calmly and with care because the skin, which has already been buffed once, is now thinner and more easily damaged. It takes an experienced buffer from 10:15 a.m. until the end of the shift, 3:30 p.m., to finish the second buff.

During the first and second buffs, the buffers are expected to check their own work to be sure they are producing a quality product and are expected to notify their supervisors if there is a problem with the skins they have received which is making it more difficult than usual to buff the skins without damaging them. However, the primary method used by Respondent to check the quality of the buffers' work is to have their work inspected by employees known as checkers, who have been trained to spot defects in the buffers' work. The checkers initially inspect the work during the second buff and inspect it periodically as that buff progresses. Sometimes a checker will determine that certain areas of the skin need to be "reworked," as there is still too much flesh on the skin, and will mark the particular areas of the skin which need additional buffing. A checker may also determine that a skin has been "overbuffed," also referred to as "burned," meaning that areas of the skin have been buffed too heavily and no amount of rework can repair the skin. Once a skin has been overbuffed it no longer has the strength to withstand the remaining skin finishing steps and may not be used as one of Respondent's quality sheep skin products.¹⁷ Respondent pays approximately \$13 for a raw sheep skin and sells the skin for approximately \$32 when finished. However, an overbuffed skin will be sold usually for only approximately \$12.

During the latter part of October and the first week of November 1988, Respondent employed the following nine buffers: Raul Baldaras, Salvador Alvarez, Francisco Nunez, Salvador Guzman, Faustino Perez, Miguel Alvarez, Francisco Narez, Alejandro Gonzalez, and Juan Mesa. Their work was supervised by Rudy Hernandez, the supervisor of the skin finishing department and Fernando Ochoa, the department's foreman. Also employed in the skin finishing department under Hernandez' supervision were checkers Antonio Montoya and Maria Espinoza, who inspected the buffers' work. Hernandez reported to Dave Davis, Respondent's production superintendent.

In July 1988¹⁸ the Union commenced the campaign to organize Respondent's production and maintenance employees, who are not represented by a labor organization. There is no showing when the Union first made its campaign public, but the record shows Respondent first learned about the campaign when, on or about October 20, it received a letter from the Union stating the Union represented a majority of Re-

spondent's production and maintenance employees, requested recognition as the collective-bargaining agent for those workers, and offered to prove its majority status by means of a card check.

On October 21, through its labor relations consultant, David Comb, Respondent answered the Union's request for recognition by sending a letter to the Union stating, in pertinent part, it refused to recognize and bargain with the Union because it doubted the Union's majority status.

On October 20 the Union filed with the Board's Regional Office a representation petition in Case 20-RC-16332, seeking a secret-ballot election in a unit of Respondent's production and maintenance employees. Subsequently, on November 7 representatives of the Union and Respondent entered into a stipulated election agreement in that case; they agreed that an election would be conducted by the Board's Regional Director on December 9. The agreement was approved on November 14 by the Board's Regional Director. The election was held as scheduled and as of the date of the hearing in this case the results were still pending before the Board.

On November 4 Respondent received a letter from the Union dated November 3 which stated, in pertinent part, that "the employees set forth in the attached Appendix A are supporters of the Union's organization campaign [and those employees] as well as other union supporters, will be wearing their union photo identification badges and other union insignia to indicate their support for the ILGWU, the Union." Attached to this letter was a list of 26 employees identified as "Union supporters"; included among the 26 were 3 of Respondent's 9 buffers: Salvador Guzman, Francisco Nunez, and Alejandro Gonzalez.

In fact the Union's organizer at a meeting of employees held November 2 had given all of the employees listed in the appendix of the Union's November 3 letter, identification badges and union buttons. The identification badges contained a picture of the employee and was signed by the employee and the Union's organizer and stated that the pictured employee "was elected member of the Organizing Committee by the workers." The union button contained the name of the Union and the Union's label.

On Friday, November 4, Nunez and Guzman wore their photo identification badges and union buttons to work for the first time and also wore them to work on Monday, November 7. They attached the photo identification badges to their shirts by means of the safety pin on the union button, so that both the badge and union button were plainly visible to an observer. The record reveals that buffer Alejandro Gonzalez wore his union button to work during this period, but is silent as to whether or not he also wore his identification badge. The record also reveals that during this period buffers Miguel Alvarez and Faustino Perez wore union buttons to work, but not identification badges.

Neither Supervisor Hernandez nor Foreman Ochoa denied that he observed Guzman and Nunez wearing the union photo identification badges and union buttons on November 4 and 7. Since the badges and buttons were worn so as to be plainly visible to an observer, I find Hernandez and Ochoa observed them being worn by Guzman and Nunez.

When asked if he observed Guzman and Nunez wearing union buttons, Plant Superintendent Davis testified "I don't recall seeing them wearing [buttons]," and when asked if that meant he did not see them wearing the union buttons,

¹⁷ A buffer with a lot of reworked skins on a particular day has not necessarily done poor work inasmuch as the skins furnished to him on that day might have been especially fleshy. However, when a skin is placed on the buffing wheel by a buffer to be reworked, it normally takes more care than usual by the buffer to avoid overbuffing or burning the skin.

¹⁸ Unless stated otherwise, all dates hereinafter refer to the year 1988.

testified “it means that I don’t really recall whether they were or not”; he explained there were a lot of employees wearing union buttons and he did not pay attention to who was wearing them because “I didn’t care.”¹⁹ Davis reluctantly admitted, however, that whenever he observed an employee wearing a union button that at the time he made this observation he realized that the employee, whose name he knew, was wearing a union button, but testified that by the time of his testimony he had forgotten the names of those employees whom he had seen wearing union buttons; he testified the reason he had forgotten their names was because “it was not important.” In presenting his aforesaid testimony, Davis’ testimonial demeanor was poor. As was the case with Hernandez and Ochoa, I find on November 4 and 7 that Davis observed Nunez and Guzman were wearing union photo identification badges and union buttons.

There is no evidence that prior to the December 9 representation election that Respondent conducted a campaign to persuade the employees to vote against union representation and there is no evidence that Respondent’s representatives otherwise, or at any time, attempted to persuade a single employee not to support the Union. In other words, the record contains no direct evidence that Respondent was antagonistic toward employees who favored union representation.

(b) Guzman’s discharge: background

In January 1987 Salvador Guzman began work for Respondent. Prior to his discharge on November 9, he had been employed by Respondent in several different departments, but since approximately October 1987 had been employed continuously as a buffer in the skin finishing department.

Plant Superintendent Davis testified that upon until November 7, Davis had regarded the quality of Guzman’s work as “very good” and that Guzman had been one of the Company’s best buffers. It was because of this that when in early 1988 Respondent tested out its new two-stage buffing procedure, it was Guzman who was selected to be the first buffer to test this new procedure and thereafter, when the Company elected to implement it, Guzman was used to train other buffers to work under that procedure.

The tally sheets which Respondent’s checkers first started to maintain on August 22, reveal the following about the quality of Guzman’s work: For the 2 days he worked from August 22 to the end of that month, he overbuffed 6 skins out of a total of 320 skins worked, for a 1.88-percent overbuff; in September for the 4 days he worked he overbuffed 8 skins out of a total of 536 skins worked, for a 1.49-percent overbuff; in October for the 19 days he worked he overbuffed 33 skins out of a total of 3,585 skins worked, for a 0.92-percent overbuff. The most skins overbuffed in 1 day by Guzman prior to November 7 was on November 2, when he overbuffed 6 skins out of 170 worked, for a 3.53-percent overbuff. Guzman’s worst daily percentage of overbuffed skins prior to November 7 occurred on November 4, when he overbuffed 5 skins out of 122

worked, for a 4.10-percent overbuff. He also overbuffed 5 skins on 3 other days: October 5 when he overbuffed 5 out of 199 skins worked, for a 2.48-percent overbuff; October 17 when he overbuffed 5 out of 196 worked, for a 2.55-percent overbuff; and October 10 when he overbuffed 5 out of 191 skins worked, for a 2.63-percent overbuff.

During his employment with Respondent Guzman received only one disciplinary warning. This was a written one issued to him on October 17 by Supervisor Hernandez, which stated he had been warned that day by Hernandez about overbuffing skins. Hernandez, when he personally issued this warning, told Guzman it was his first warning and if he received a second one it would result in a 1-week suspension and that a third warning would result in his discharge.

By either late October or the first week of November, Guzman had become tired of working under the pressure associated with the job of buffing and because of this spoke to Supervisor Hernandez and asked to be transferred to a job in another department. Hernandez told him he would check into the matter. Hernandez testified he informed Plant Superintendent Davis about Guzman’s transfer request and that Davis’ response was that Guzman was an experienced buffer, so the Company could not afford to transfer him to another job. Hernandez further testified that Hernandez then personally informed Guzman of Davis’ response. Davis, on the other hand, testified that after being informed by Hernandez about Guzman’s transfer request that, in Hernandez’ presence, Davis, late in October, personally spoke to Guzman and told Guzman he did not want to transfer him to another job because he was too good a buffer, and that Guzman said nothing in reply.

Respondent contends that even though Guzman’s request for a job transfer was turned down by Davis in late October or early November, that on November 7 Guzman again requested a transfer and this time Plant Superintendent Davis agreed to grant his request when a suitable job vacancy occurred. In support of this contention Respondent relies upon Davis’ testimony that at approximately 9:30 a.m. on November 7 Supervisor Hernandez came to him and stated Guzman had again asked for a transfer. Davis testified he responded by stating he did not really want to transfer Guzman to another job, but told Hernandez that because Guzman was insisting on a transfer, that Davis would check to see what other job openings were available which were suitable for Guzman, and that in the meantime Guzman would have to continue working as a buffer until Davis found another suitable job for him. Davis testified he ended this conversation by advising Hernandez that when he found a vacant job which was suitable for Guzman, that Davis would notify Hernandez. Hernandez testified that at 10:30 a.m. on November 7 Guzman called him over to his buffing wheel and asked “if [Hernandez] would talk to [Davis] about a transfer.” This was the extent of Hernandez’ testimony on this subject. He failed to corroborate Davis’ testimony that on November 7 he spoke to Davis about Guzman’s alleged request for a transfer. Also, when Hernandez testified about the events of November 7, he significantly failed to mention ever informing Guzman about Davis’ response to Guzman’s November 7 request for a job transfer. Guzman testified he did not speak to Hernandez on November 7 about a job transfer. I credit Guzman’s testimony and reject Hernandez’ and Davis’ because: Davis’ testimonial demeanor was poor when

¹⁹ Davis did not deny he was informed about the contents of the Union’s letter received by Respondent on November 4 which named 26 of the Company’s employees, including Guzman and Nunez, who it stated were supporters of the Union’s organizational campaign and would be wearing union photo identification badges and union buttons to work. In view of Davis’ position as plant superintendent I find that Davis was immediately informed about that letter and its contents. There is no evidence to the contrary.

he testified about his November 7 conversation with Hernandez concerning Guzman's request for a job transfer; Davis' testimony about his conversation with Hernandez was not corroborated by Hernandez' testimony; Hernandez' testimonial demeanor was poor when he testified that on November 7 Guzman asked him to talk to Davis about a job transfer; and, Hernandez significantly failed to mention in his testimony that he relayed Davis' November 7 message to Guzman concerning Davis' decision to grant his transfer request, which presumably Hernandez would have done if he had in fact been given such a message by Davis. In rejecting Davis' and Hernandez' testimony, I considered that Guzman lied to the Employment Development Department for the State of California when, in filing an unemployment compensation claim against Respondent, he stated he was laid off by Respondent on November 7, rather than discharged. Nonetheless, for the reasons set forth above, I credited Guzman's testimony in this instance. Moreover, Guzman's testimonial demeanor in this instance was better than Hernandez'.

c. Guzman's discharge: the events of November 7

On November 7 Guzman was assigned 175 skins for buffing. He began work on them at 7 a.m., the start of his workshift. Checker Maria Espinoza began inspecting his second buff at approximately 10:15 a.m. She inspected his work until 11 a.m. when the department's other check, Antonio Montoya, began to check his work.

During the 45 minutes on November 7 that Espinoza inspected Guzman's work, she checked 30 skins he had buffed, of which 10 needed to be reworked. When Montoya began inspecting his work at approximately 11 a.m., he was informed by Espinoza that Guzman had not overbuffed any skins, but had done a significant number of skins that needed to be reworked and that his work was bad.

Soon after Montoya began checking Guzman's work he found Guzman was overbuffing skins and at approximately 11:15 a.m. notified Foreman Ochoa about this. Ochoa showed two of the overbuffed skins to Guzman and told him he was overbuffing skins. Guzman replied, "no it can't be." Ochoa told him that in his opinion Guzman was not standing high enough over the buffing wheel and asked if he needed some mats to stand on. Guzman stated, "no."²⁰ Nevertheless, Ochoa brought some mats over to Guzman's buffing wheel which Guzman did not use.²¹

Thereafter, shortly after 12:30 p.m., when Montoya found Guzman was continuing to overbuff, he told Guzman to try to work more carefully because he was overbuffing too many skins. Guzman replied, "he was going to try."

Later, at approximately 1 p.m., Montoya informed Supervisor Hernandez that Guzman was overbuffing skins and showed him the skins. Hernandez took some of the skins to Guzman and showed him the areas of the skins that were being overbuffed and told him to be real careful about buffing those areas and suggested he "should back off" on those

areas and be more careful. Guzman did not reply; he just shrugged his shoulders.²²

Subsequently, at approximately 1:45 p.m., when Montoya picked up some skins from Guzman's worktable to check, Montoya again cautioned Guzman to work more carefully because he was overbuffing too many skins. This time Guzman responded by stating that he was not able to work more carefully than he had been doing.²³

Shortly thereafter, between 1:30 p.m. and 1:45 p.m., Montoya discovered Guzman had overbuffed eight or nine additional skins since he had last inspected his work, so he informed Foreman Ochoa about this and suggested that Ochoa speak to Guzman. Ochoa took some of the overbuffed skins and went to Guzman's buffing wheel and showed him the skins and asked him why he did not use the additional mats which Ochoa had previously left for him. Guzman stated it was not necessary for him to use the mats. Guzman did not explain why he was overbuffing so many skins.²⁴

Subsequently, shortly after 2 p.m., Montoya checked Guzman's work and discovered that since his last inspection, Guzman had overbuffed between 10 and 12 more skins, so he promptly informed Department Supervisor Hernandez about this. Hernandez first looked at the overbuffed skins and then called Guzman over to Montoya's worktable. Hernandez, in Montoya's presence, told Guzman he was overbuffing too many skins and had continued to overbuff skins even after being spoken to about the matter. Guzman answered he had already stated the skins were bad. Hernandez replied that both Hernandez and Ochoa had already told him to be careful when buffing the skins and that Guzman had not listened to their words of caution and that because of this something would have to be done. Hernandez then contacted Superintendent Davis and asked him to come to Montoya's worktable.²⁵

²² The description of the conversations Hernandez had with Montoya and Guzman is based upon Hernandez' testimony. Guzman testified the only time Hernandez spoke to him about his work on November 7 was when, as described infra, Hernandez translated for Superintendent Davis. In general Hernandez did not impress me as a trustworthy witness and Montoya failed to corroborate Hernandez' testimony that Montoya spoke to him about Guzman's work at this time. Nonetheless, I credited Hernandez' testimony and rejected Guzman's because Hernandez' testimonial demeanor was better than Guzman's when they testified about this particular subject matter.

²³ The descriptions of the November 7 conversations between Montoya and Guzman are based upon Montoya's testimony. Guzman testified that the first time Montoya spoke to him on November 7 about overbuffing, that Montoya told him the skins were "too hard" and that Guzman "should try to do them better." Guzman further testified that the second time Montoya spoke to him that day about overbuffing, that Guzman told Montoya the skins were "really soft" and because of this "they get burned very easily" and that Montoya replied by stating that Guzman should take more time so the skins would come out better. I credited Montoya's testimony because his testimonial demeanor, which was good, was better than Guzman's.

²⁴ The factual findings set forth in this paragraph are based upon the testimony of Montoya and Ochoa. Guzman testified in effect that the only time Ochoa spoke to him about his work on November 7 was at approximately 11 a.m. I credited Ochoa's testimony because, in significant part, it was corroborated by Montoya's, and because Ochoa's testimonial demeanor, when he testified about this particular matter, was better than Guzman's.

²⁵ The factual findings in this paragraph are based upon Montoya's testimony. Guzman testified in substance that on November 7 Hernandez did not speak to him about his work, other than as an interpreter for Superintendent Davis. Hernandez' testimony about his above-described conversations with Guzman, differs substantially from Montoya's account and differs from the account contained in Hernandez' prehearing affidavit submitted to the Board. I credit Montoya's above-described testimony because his testimonial demeanor was good, whereas the testimonial demeanor of Hernandez and Guzman was not good when they testified about this particular subject matter.

²⁰ The description of this conversation is based upon Ochoa's testimony. Guzman testified Ochoa told him he needed to use more pressure on the skins because the skins were "just getting scratched too much." I credited Ochoa's testimony because his testimonial demeanor was better than Guzman's.

²¹ In the past, on several different occasions, Ochoa had suggested to Guzman that he use mats, so he would stand higher above his buffing wheel, but on each occasion Guzman refused to use the mats.

In response to Hernandez' call, Davis arrived at Montoya's worktable at approximately 2:15 p.m., the start of the employees' afternoon break period. Montoya went on his break, leaving Hernandez and Davis. Hernandez told Davis Guzman had overbuffed quite a number of skins and showed Davis the overbuffed skins which had been stacked in a pile. Davis looked at the tally sheet maintained by Montoya which showed that from the time Montoya had inspected Guzman's work that day, he had inspected 98 skins worked on by Guzman, of which 30 needed to be reworked and 23 had been overbuffed. Davis also inspected most of the skins which Guzman had overbuffed and counted at least 15 in the pile before he stopped looking. Davis then asked Hernandez to have Guzman come over to the checking table. When Guzman came to the table, Davis, using Hernandez as his interpreter, spoke to him. He asked Guzman, "what's going on?" and pointing to the pile of overbuffed skins, asked Guzman "why did this happened [sic]?" Guzman did not answer; he "shrugged" his shoulders. Davis told him that short of taking a razor blade and cutting the skins or stealing the skins, that overbuffing was just about the worst thing that could be done to the skins. Davis told him, pending an investigation by management, he was being suspended and directed him to punch out and go home. Guzman punched out at approximately 2:25 p.m.; his regular workday would have ended at 3:30 p.m.

The description of the aforesaid conversation between Guzman and Davis is based upon Davis' testimony. Guzman testified that, speaking to him through Hernandez, Davis showed him a pile of skins which he stated had been overbuffed by Guzman, stated that Guzman had overbuffed approximately 20 skins, and was going to be punished by being sent home immediately. Guzman further testified that the only thing he (Guzman) said in his defense was that, when Davis stated he had overbuffed approximately 20 skins, Guzman replied by stating, "there were not that many skins." During cross-examination, however, Guzman testified he explained to Davis that some of the overbuffed skins in the pile were not that much overbuffed, that they were only a little overbuffed and told Davis that sometimes Respondent let those go through. Guzman did not, however, include this in his prehearing affidavit submitted to the Board, which among other things, gave an account of his conversation with Davis. Rather the affidavit, like his initial testimony, states in effect that Guzman did not explain to Davis his reason or reasons for overbuffing so many skins. I credited Davis' description of this conversation, as set forth above, because his testimonial demeanor was better than Guzman's.

Guzman testified he informed the Board agent who questioned him in connection with the prehearing affidavit, which he submitted to the Board on January 11, 1989, that on November 7, "I was burning skins and that I burnt an average from 14 to 20 skins." Guzman further testified that the reason why he overbuffed so many skins on November 7 was that some of the skins were very "soft," others were "too hard," and others were already damaged. However, Guzman also testified that the skins he was given on November 7 to buff "were just like the skins that you get everyday when you work at [Respondent]." In view of this admission and Guzman's failure to offer the above-described explanation to Davis, I reject it. Rather I credit the testimony given by Ochoa, Montoya, and Espinoza to the effect that there was

nothing wrong with the skins given to Guzman on November 7. Rather I find, as Montoya testified, that the skins worked on by Guzman on November 7 "were workable if you work them carefully and calmly."

d. Nunez' discharge: background

Francisco Nunez went to work for Respondent in May as a buffer and was employed in that capacity until his November 8 discharge. Plant Superintendent Davis testified that Nunez was a "good" buffer and that prior to November 7 Respondent had no real problems whatsoever with the quality of his work. However, like Guzman, Nunez wanted to transfer to another position. Thus, in October he asked a supervisor of another department if there was a vacancy in that department because Nunez stated he wanted to transfer into that department from the skin finishing department. The supervisor, after speaking to Davis, told Nunez that Davis wanted him to remain in the skin finishing department as a buffer.

The tally sheets which Respondent's checkers first started to maintain on August 22, show the following about the quality of Nunez' work: For the 4 days he buffed from August 22 to the end of the month, he overbuffed 3 skins out of 670 worked, for a 0.45-percent overbuff; in September for the 7 days he buffed he overbuffed 12 skins out of 1242 worked, for a 0.97-percent overbuff; in October for the 16 days he buffed he overbuffed 14 skins out of 2964 worked, for a 0.47-percent overbuff. The most skins overbuffed in any one day by Nunez during his employment was when, after having been employed as a buffer for only 3 weeks, he overbuffed approximately 25 skins. Subsequently, the most skins he overbuffed in any one day prior to November 7 was when, on a day prior to August 22, he overbuffed six skins. During the period from August 22 to November 7 the most skins he overbuffed in any one day was on September 21 and October 10 when he overbuffed 4 skins on each of those days—on September 21 he overbuffed 4 out of a total of 204 skins worked, for a 1.96-percent overbuff and October 10 overbuffed 4 out of a total of 184 skins worked, for a 2.17-percent overbuff. His worst daily percentage of overbuffed skins between August 22 and November 7 occurred October 10 when, as described supra, he overbuffed four skins.

Nunez' uncontradicted and undenied testimony is that during his employment with Respondent he received a total of two work-related warnings, as follows: On "more or less" October 22 Supervisor Hernandez told him he was being issued a disciplinary warning for having overbuffed three skins;²⁶ and, in October while employed for a day pulling skins from the ovens and hanging them up, he left work at the end of his workshift even though there were still several skins remaining to be hung, and, as a result, was told by Hernandez if he engaged in that conduct again he would be issued a disciplinary warning. These were the only two

²⁶Nunez was obviously mistaken about the date of this warning inasmuch as the record shows that he did not overbuff three skins on or about October 22 or on any date in that vicinity. He may have been referring to a handwritten note dated August 22 which was submitted by Respondent to the State of California Employment Development Department after Nunez' discharge, which states that Nunez was warned by Hernandez about overbuffing skins and told if it happened again "he would be written up." However, Respondent presented no evidence whatsoever concerning that warning and, as described supra, Nunez in effect denied having received such a warning and his denial was not contradicted.

warnings issued to Nunez by Hernandez during his employment.

(e) *Nunez' discharge: the events of November 7 and 8*

On November 7 Nunez began work at his usual starting time, 7 a.m., and was given 175 skins to buff. The quality of the skins was normal, no different than the skins usually given the buffers.²⁷ Checker Montoya credibly testified, "they were workable if you work them carefully and calmly." Nunez finished his first buff of the skins at approximately 10 a.m. and at that time commenced his second buff.²⁸ Espinoza began checking Nunez' second buff at approximately 10:15 a.m. She inspected his work until approximately 11 a.m. when the department's other checker, Montoya, began to check his work.

Shortly before 10:45 a.m. on November 7, while checking the skins Nunez had buffed, Espinoza observed he had overbuffed five or six skins. She promptly informed Foreman Ochoa about this. Ochoa took some of the overbuffed skins and went to Nunez' buffing wheel. He told Nunez that he had overbuffed approximately five skins. Nunez responded by stating that the skins he had overbuffed were ones he had reworked and that Espinoza, who Nunez stated did not know how to properly check, had been having him unnecessarily rework skins. Ochoa replied that the skins Nunez had overbuffed were not reworked skins, but normal ones.²⁹

Shortly thereafter, at approximately 11 a.m., Espinoza also informed Department Supervisor Hernandez that Nunez had overbuffed approximately five or six skins. Hernandez took some of the overbuffed skins to Nunez' workstation and spoke to him. He showed Nunez the areas of the skins which had been overbuffed and told him to be more careful. Nunez said nothing.³⁰

Espinoza, at about the same time she informed Hernandez about Nunez' overbuffing, also informed the department's other checker, Montoya, that Nunez had overbuffed five or

six skins. Montoya spent a few minutes with Espinoza looking at the skins Nunez had overbuffed and then took over the task of inspecting his work. As of this time, approximately a little after 11 a.m., Nunez had overbuffed 5 or 6 skins out of a total of 54 skins worked, of which 10 had been reworked.³¹

At approximately 11:30 a.m. on November 7, Montoya observed Nunez had overbuffed approximately five more skins and told Ochoa about this. Subsequently, at approximately 1:40 p.m., Montoya observed Nunez had overbuffed three or four more skins. Montoya at this time informed Ochoa that Nunez was continuing to overbuff skins. Ochoa took two of the overbuffed skins to Nunez' workstation and showed them to him and demonstrated to Nunez how to buff so as to avoid overbuffing, and buffed two or three skins while Nunez watched. Nunez' response was to declare in a loud voice that he did not perform miracles, that it was not worth a "fuck," and that he intended to look for another job. Ochoa returned the skins to Montoya and instructed Montoya to watch Nunez' work very carefully because he did not want any more overbuffed skins.

Subsequently at approximately 3:30 p.m., after observing Nunez was still overbuffing skins, Montoya informed Ochoa about this and stated Nunez had already overbuffed 12 skins. Ochoa took two of the overbuffed skins and again went to Nunez' workstation and told him he was told him he was still overbuffing, again demonstrated to him how to work without overbuffing, and told him to take his time and do the remainder of the skins carefully. Nunez' only response was to repeat that he was not a moracle worker, that he intended to look for another job and that it was not worth a "fuck."

The description of the above conversations between Ochoa and Nunez are based upon Ochoa's testimony. Nunez testified his only November 7 conversation with Ochoa occurred at Nunez' workstation at approximately 3:40 and 4:40 p.m. Regarding the 3:40 p.m. conversation, Nunez testified that when Ochoa told him he was overbuffing too many skins, he told Ochoa the skins he had been given were "kind of poor" and Espinoza was returning too many skins to be reworked and that this might be the reason for his overbuffing. Nunez further testified that Ochoa replied by agreeing that Espinoza had returned too many skins to be reworked and by stating that he (Ochoa) intended to assist Espinoza in checking the skins. Regarding the 4:40 p.m. conversation, Nunez testified Ochoa told him he had overbuffed 14 skins, took Nunez over to the checker's table to look at the pile of skins he had overbuffed, that Nunez did not bother to inspect the pile of skins which Ochoa showed to him, but Nunez did look at Espinoza's tally sheet which showed he had overbuffed 14 skins, and ended the conversation by asking Ochoa if management would be angry with him because he had overbuffed the skins and whether it would cause him a problem, and that Ochoa answered by stating "let's see what [Hernandez] says tomorrow morning." Nunez denies he told Ochoa he did not give a "fuck" or that he did not perform miracles or that he intended to find another job. I credited Ochoa's testimony because his testimonial demeanor was better than Nunez' with respect to the disputed conversations and because Ochoa's testimony in significant part

²⁷ Based upon the testimony of Montoya, Espinoza, and Ochoa. Nunez testified that 80 of the skins given to him on November 7 were "in kind of a poor condition" to buff because they were damaged in various areas. He further testified that when he was given 200 skins a day to buff that there would be as many as 80 in poor condition, but normally he would only receive between 20 and 30 skins in poor condition. I credited the testimony of Montoya, Espinoza, and Ochoa because their testimonial demeanor was better than Nunez' on this subject.

²⁸ Based upon the testimony of Montoya, Espinoza, and Ochoa. I reject Nunez' testimony that he did not start his second buff until shortly after 12:30 p.m., the end of the lunchbreak period. The testimonial demeanor of Montoya, Espinoza, and Ochoa was better than Nunez' on this subject.

²⁹ This description of Ochoa's conversation with Nunez is based upon Ochoa's testimony. Nunez denied the conversation occurred. I credited Ochoa's testimony because his testimony that he spoke to Nunez at this time was corroborated by the testimony of Montoya, whose testimonial demeanor was good, and because Ochoa's testimonial demeanor was better than Nunez'.

³⁰ This description of Hernandez' conversation with Nunez is based on Hernandez' testimony. Nunez testified Hernandez did not at this time speak to him about his work. I considered there is no mention of this conversation in Hernandez' prehearing affidavit submitted to the Board and also considered that in general Hernandez' testimonial demeanor was poor. However, I credited his testimony about this conversation because his testimony that he spoke to Nunez at this time was corroborated by the testimony of Espinoza whose testimonial demeanor was good. But, I do not credit Hernandez' further testimony that at approximately 1:15 p.m. Montoya told him Nunez was continuing to overbuff skins and as a result Hernandez again spoke to Nunez about his overbuffing. Nunez in effect denied that such a conversation occurred, Montoya did not corroborate Hernandez' testimony, and Hernandez' testimonial demeanor was poor.

³¹ Based upon a composite of the testimony of Espinoza and Montoya and the tally sheet maintained by Espinoza.

was corroborated by the testimony of Montoya whose testimonial demeanor was good.

Subsequently, at approximately 4:30 p.m., Montoya observed Nunez had overbuffed more skins, so he notified Ochoa about this. Since Supervisor Hernandez was not at work, having left earlier that afternoon for a doctor's appointment, they notified Plant Superintendent Davis about Nunez' overbuffing. Montoya showed Davis the pile of skins Nunez had overbuffed that day. Davis told them to put those skins to one side and he would return shortly.

Shortly thereafter, at approximately 5 p.m., Davis returned with Personnel Manager Hood and Vice President Nino Giacalone. They looked at the pile of skins Nunez had overbuffed and while they were doing so Davis called Foreman Ochoa over and asked whether he had spoken to Nunez about the overbuffing. Ochoa replied he had spoken to Nunez but that Nunez had responded by stating he could not produce miracles and that he was not a machine and had been abusive toward Ochoa using foul and abusive language.³² Davis directed that the overbuffed skins be placed in a box, that Nunez' name be placed on the box, and that the skins be kept until management could discuss the matter further.³³

After discussing the matter Hood, Giacalone, and Davis agreed Nunez should be suspended pending further investigation. Davis testified that Respondent's only reason for suspending Nunez was for "overbuffing about 20-22 skins (Tr. 533)." ³⁴

On November 8, prior to the start of the workday, Davis testified he instructed Hernandez that when Nunez came to work that day he was not to be allowed to punch in for work because he was suspended pending a review by management. This was the extent of Davis' testimony about his instruction to Hernandez. Hernandez testified Davis also told him Nunez was suspended because he had overbuffed a large number of skins and had given Ochoa a bad time.

On November 8, when Nunez arrived for work, he was notified by Hernandez that he could not work that day because he had overbuffed 20 skins. Nunez responded by stating it was his understanding he had overbuffed 14, rather than 20 skins. Hernandez stated he had personally checked

the skins overbuffed by Nunez and found 20 overbuffed skins. Nunez asked to speak to Superintendent Davis. Hernandez turned down this request, explaining to Nunez that Davis already knew about the problem. Nunez then asked for and was granted permission to talk to Foreman Ochoa. Nunez walked over to where Ochoa was working and told Ochoa he had been suspended. Ochoa replied by stating, "I don't know anything," at which point Hernandez interrupted by instructing Ochoa not to say anything and told Nunez to leave.

(f) *The November 8 meeting between Davis, Hood, and Giacalone*

Respondent presented evidence that the decision to discharge Guzman and Nunez was the result of an early morning meeting held on November 8 between Plant Superintendent Davis, Personnel Manager Hood, and Vice President Giacalone. This evidence—the testimony of Davis, Hood, and Supervisor Hernandez—is set forth and evaluated in this section.

The pertinent part of Davis' testimony concerning this meeting follows. Davis told Hood and Giacalone that Guzman's overbuffing on November 7 had been caused by "total carelessness" and that since Guzman wanted to be reassigned that Davis thought Guzman should be given a 5-day disciplinary suspension and then reassigned to another job as requested. Regarding Nunez' discipline, Davis stated there was no excuse for his overbuffing so many skins on November 7 in such a short time period, that Nunez had also been abusive and argumentative with Foreman Ochoa, and because of this Davis had concluded his actions were "willful and intentional" and he should be discharged. Hood took the position Respondent should be even-handed and suspend both Guzman and Nunez. Giacalone stated Ruby Hernandez should be called into the meeting and his views solicited because he was Guzman's and Nunez' immediate supervisor. Hernandez was called into the meeting. Davis told Hernandez that he thought Guzman should be suspended for 5 days and Nunez discharged and repeated to Hernandez the reasons he previously had expressed to Hood and Giacalone for this opinion. Hernandez agreed Nunez should be discharged, but disagreed about Guzman's suspension. Hernandez stated he thought Guzman was "entirely too qualified, too skilled a buffer to have done that much damage in short time without it being intentional" and stated it was his opinion that Guzman, who wanted to be reassigned to another job, had "willfully and intentionally overbuffed the skins hoping to be reassigned." Davis told Hood and Giacalone he agreed with what Hernandez had stated and that Guzman, as well as Nunez, should be discharged. Hood and Giacalone agreed with this decision.

The pertinent part of Hood's testimony concerning this meeting is as follows. Davis recommended Guzman be suspended for 5 days because he had overbuffed a large number of skins on November 7 in a short period of time, which Davis felt was due to "strictly carelessness." Regarding Nunez' discipline, Davis stated Nunez in overbuffing the skins on November 7 had done so "intentionally, deliberately" and because of this should be discharged. In support of this Davis pointed out that Nunez had been hired strictly for overbuffing and was a good buffer and there was no reason for him to have overbuffed so many skins in such a short

³² This description of Ochoa's remarks to Davis is based upon Davis' testimony which was corroborated by Ochoa's testimony. I have considered that Hernandez testified that shortly after he returned to work on November 7 from his doctor's appointment, that he also informed Davis that Nunez had given Ochoa a "bad time" and further informed Davis that he (Hernandez) had tried to show Nunez the areas he was overbuffing and told him to be more careful in buffing, but that Nunez had not replied. I did not credit this testimony because Hernandez' testimonial demeanor was poor and his testimony was not corroborated by Davis' testimony.

³³ Davis testified that his reason for boxing and keeping Nunez' overbuffed skins was:

I thought I should have a record. I thought I should have his skins because I couldn't understand why he could have overbuffed so many skins in such a short period of time. I thought his actions were willful and intentional. At the time I thought I should discharge him. But . . . in any case of an employee who has any kind of service at all we normally like to have a meeting and discuss . . . the action to be taken. [Tr. 534-535.]

Regarding Guzman, Davis testified that, in contrast to Nunez, "I didn't think Guzman's actions at the time when I suspended him were intentional. Careless, yes, but not intentional. In other words, my thought was that I would suspend him [Guzman] and place him on a disciplinary reassignment to a lower rated job when he returned to work." (Tr. 535.)

³⁴ I note that Montoya's tally sheet for November 7 shows that on that day Montoya had checked 158 skins which Nunez had buffed, that 60 of those skins had been reworked skins, and 21 of the 158 skins had been overbuffed.

period of time and that Nunez was also abusive to Foreman Ochoa. Hood took the position that since Nunez and Guzman had overbuffed a similar amount of skins that perhaps they both should receive the same punishment; both be suspended without pay for 5 days. Giacalone suggested that Supervisor Hernandez be called into the meeting and his opinion solicited. Hernandez entered the room. Hernandez agreed with Davis that Nunez should be discharged and pointed out this punishment was especially appropriate because Nunez had been insubordinate to Foreman Ochoa. Regarding Guzman's discipline, Hernandez stated Guzman had previously asked for a transfer to another position, that he was a good buffer and as a good buffer should have known what he was doing, and stated that if Respondent intended to discharge Nunez then Guzman should also be discharged. At this point Hernandez left the room. Davis, Hood, and Giacalone, after discussing the matter further, all agreed that Guzman, like Nunez, should be discharged because they agreed that, like Nunez, Guzman had intentionally overbuffed skins in order to be reassigned to another job.

Hernandez' testimony concerning this meeting is as follows. After being called into the meeting, Hernandez was informed by Davis, in the presence of Hood and Giacalone, that Respondent intended to discharge Nunez for overbuffing skins and for harassing Foreman Ochoa and intended to suspend Guzman for 5 days without pay. Hernandez replied by stating that, in Guzman's case, he disagreed with the punishment being imposed, that he thought Guzman should be discharged because there was no excuse for such an experienced and good buffer to have overbuffed so many skins in such a short period of time, especially since Hernandez and Ochoa had tried to assist him. Davis replied by informing Hernandez that "he agreed . . . with [Hernandez'] decision," at which point Hernandez left the room.

Late in January 1989, at Respondent's place of business in the presence of Respondent's labor relations consultant, David Comb, and Respondent's personnel manager, Sandra Hood, Hernandez was questioned about Guzman's and Nunez' discharges by an agent of the Board and submitted a signed sworn affidavit to the Board agent. In this affidavit, after describing what Davis stated to Guzman on November 7 when Davis told Guzman to go home because he was suspended, Hernandez went on to state the following:

I do not recall what happened after that [referring to Guzman's employment] but [Davis] probably told me later that Guzman has been terminated. I do not recall being present when Guzman was discharged. I don't think I recommended to Davis that Guzman be fired.

Hernandez testified he was incorrect when he stated in the affidavit that, "I don't think I recommended to Davis that Guzman be fired," because he testified that on November 8, as set forth in his above-described testimony, "I did offer my suggestion on firing Guzman." Hernandez testified that the reason he did not tell the Board agent about his November 8 meeting with Davis, Hood, and Giacalone was that "I just really could not remember at that time."

Also relevant in evaluating the aforesaid testimony of Hood, Davis, and Hernandez are the several statements made by Respondent's representatives, contemporaneously with Guzman's and Nunez' discharges, when Respondent docu-

mented in its personnel files its reason for the discharges and when Respondent explained the reason for the discharges to the Employment Development Department for the State of California and to the other buffers employed in the skin finishing department. These explanations are set forth below.

On November 8 Hernandez signed and Davis initialed "Personnel Change Order" forms which stated Guzman and Nunez had been "discharged" and in the space entitled "explanation" stated, "generating excessive waste of product."

On November 9 Hernandez filled out and signed and Davis initialed a "Rehire Eligibility Request" form which stated they did not recommend Guzman for rehire because he "overbuffed a large number of skins that was inexcusable."

Immediately after their discharges Guzman and Nunez filed claims for unemployment compensation with the Employment Development Department for the State of California. On November 14 Respondent, through Personnel Manager Sandra Hood, filed written responses to their claims with the Employment Development Department and in these responses gave the following explanations for their discharges:

[Guzman] was suspended pending investigation by management on 11/7/88 for excessive overbuffing of sheep skins after he had been warned several times.

[Davis, Hernandez and Hood] met to determine what disciplinary action would be taken. It was decided that [Guzman] had been warned a sufficient number of times, and that we could no longer tolerate the ruining of the product by [Guzman] any longer. It was decided to discharge him for excessive waste of our product.

[Guzman] has been buffing since March of 1987 and should not have been making this type of error.

[Nunez] was suspended pending investigation by management on 11/7/88 for excessive overbuffing of sheep skins after he had been warned several times.

[Davis, Hernandez and Hood] met to determine what disciplinary action would be taken. It was decided that [Nunez] had been warned a sufficient number of times, and that we could no longer tolerate the continual ruining of the product any longer. It was decided to discharge him for excessive waste of our product.

In November, soon after Nunez' and Guzman's discharges, the other buffers employed by Respondent went to Personnel Manager Hood and told her that Nunez' and Guzman's discharges had made them nervous because they felt that, like Nunez and Guzman, they would be discharged for overbuffing. As a result of these expressed concerns, Hood arranged for Plant Superintendent Davis to meet with the buffers later that same day. During their meeting with Davis the buffers told him that the reason they were overbuffing a lot of skins was that they were being required to do too much work in too short a period of time. Davis responded by stating he would consider their complaint and see if a solution could be found, but also told them he expected no more than four or five skins to be overbuffed by a buffer in a single day and if anyone overbuffed more than that number of skins he "could" be discharged. One of the buffers asked why Nunez and Guzman had been discharged. The only explanation which Davis gave in response to this question was that Guzman and Nunez "had burnt too many skins and that

that kind of work was not in the best interest of the Company.”

As described supra, Davis and Hood testified in effect that on November 8, after consulting with Hernandez, that Davis, Hood, and Giacalone decided to discharge Guzman and Nunez and in doing so worded their decision not in terms of Guzman and Nunez having overbuffed a large number of skins without any good reasons, but in terms of Guzman and Nunez having “willfully” and “intentionally” overbuffed a large number of skins. I do not credit their testimony for the following reasons.

Davis’ and Hood’s testimonial demeanor was poor when they testified about the November 8 meeting.

Davis’ and Hood’s testimony about the November 8 meeting was not, in significant part, corroborated by Hernandez’ testimony. Hernandez testified that when Davis explained his reason for concluding that Nunez should be discharged, that Davis merely stated Nunez was being discharged for overbuffing skins and for harassing Foreman Ochoa. Hernandez did not testify that Davis indicated expressly or by implication that Nunez was being discharged because Davis believed he had willfully or intentionally overbuffed skins. Hernandez further testified in effect that when Hernandez expressed his disagreement with Davis’ conclusion that Guzman should be suspended, rather than discharged, that Hernandez did not, as Davis testified, state that Hernandez thought Guzman should be discharged because Guzman had “willfully and intentionally overbuffed the skins hoping to be reassigned.” Rather Hernandez testified he told Davis that Guzman should be discharged because Hernandez felt there was no excuse for such an experienced and good buffer to overbuff so many skins in such a short period of time, especially when Hernandez and Ochoa had tried to assist him. In other words, Hernandez’ testimony does not corroborate Davis’ and Hood’s testimony that at the November 8 meeting Davis and Hernandez worded their belief that Guzman and Nunez should be discharged in terms of their having willfully and intentionally overbuffed skins.

Contemporaneously with Guzman’s and Nunez’ discharge, in documenting the reason for the discharges for its personnel records and in explaining the reason for the discharges to its other buffers and to the State of California’s Employment Development Department, Respondent did not expressly or by implication state that Nunez and/or Guzman had been discharged for having willfully or intentionally or deliberately overbuffed skins. Rather, in Guzman’s and Nunez’ “Personnel Change Order” forms, Davis and Hernandez stated that they had been discharged for “generating excessive waste of product,” and in Guzman’s “Rehire Eligibility Request” form Davis and Hernandez stated Guzman was not eligible for rehire because he had “overbuffed a large number of skins that was inexcusable.” Subsequently, in contesting Nunez’ and Guzman’s unemployment compensation claims, Respondent’s personnel manager, Hood, informed the California Employment Development Department that the reason for Guzman’s and Nunez’ discharges was that Respondent had decided they had been warned a sufficient number of times about overbuffing, that Respondent could no longer tolerate the ruining of the product by them, so “it was decided to discharge [them] for excessive waste of our product.” Finally, and most significantly, when Respondent’s other buffers asked Davis for an explanation of Nunez’ and

Guzman’s discharges they were not informed by Davis, expressly or by implication, that they were discharged for having overbuffed skins willfully or intentionally. Rather, Davis told the buffers that Guzman and Nunez had been discharged because “they had burnt too many skins and that that kind of worker was not in the best interest of the Company.” If, during this period of time, Respondent’s management met and decided to discharge Guzman and Nunez because they had overbuffed skins willfully and intentionally, I find it incredible that Respondent’s management did not even once, expressly or by implication, indicate that either one of them had been discharged for overbuffing skins willfully or intentionally, when management documented the discharges for Respondent’s personnel files, explained the discharges to the other buffers, and explained the discharges to an agency of the State of California when contesting Nunez’ and Guzman’s unemployment compensation claims.

Lastly, when viewed in the context of the above circumstances, Respondent’s failure to call its vice president, Nino Giacalone, to corroborate the testimony of Davis and Hood warrants the inference that his testimony would have been adverse to the Respondent had he testified. See *International Automated Machines*, 285 NLRB 1122 (1987); *Paramount Poultry*, 294 NLRB 867, 868 (1989). According to Davis’ and Hood’s testimony, Giacalone was responsible for Hernandez being called into the meeting which in effect led to Guzman’s discharge for overbuffing skins intentionally and willfully. Yet, as described supra, Hernandez failed to corroborate Davis’ and Hood’s testimony that Hernandez based his recommendation that Guzman be discharged upon a belief that Guzman’s overbuffing had been done willfully and intentionally. I also note there is evidence which makes me wonder whether Giacalone was in fact present at the November 8 meeting or whether in fact such a meeting was ever held. In this regard, as described supra, when Personnel Manager Hood responded to Guzman’s and Nunez’ claims for unemployment compensation, Hood informed the Employment Development Department for the State of California that it was Davis, Hood, and Hernandez rather than Davis, Hood, and Giacalone who met to determine what disciplinary action would be taken against Guzman and Nunez. Hood’s testimony that she had forgotten that Giacalone attended that meeting, as her excuse for not placing him at the meeting, does not ring true since Giacalone supposedly assumed a significant role at that meeting; it was Giacalone who supposedly was the person responsible for Hernandez being called into the meeting and consulted by Davis, Hood and Giacalone. Also, as described supra, in his prehearing affidavit submitted to the Board, Hernandez did not mention this meeting nor the fact that he was called into a meeting where he recommended or suggested to Davis, Hood, and Giacalone that Guzman be discharged, rather than suspended. Hernandez testified that his reason for not informing the Board agent who took his affidavit about this meeting was that, “I just really could not remember at that time.” This explanation does not ring true because if Davis and Hood are to be believed it was Hernandez’ recommendation which resulted in Guzman being discharged, rather than just merely suspended, and that Hernandez knew this. In short, I find it inconceivable that Hernandez would have forgotten about such a significant event concerning Guzman’s discharge or if the meeting occurred as Hood testified, that Hood would not

have refreshed his memory about this occasion before he affixed his signature to his affidavit. These additional circumstances, in my opinion, lend further support to the inference that Giacalone's testimony would have been adverse to the Respondent if he had testified.

It is for all of the above reasons, in their totality, that I find Davis and Hood were not telling the truth when they testified that at a meeting held December 8 that in deciding to discharge Nunez and Guzman that management worded the discharge decision in terms of a belief that Nunez and Guzman had overbuffed the skins willfully and/or intentionally.

(g) *The discharge of Guzman and Nunez*

Plant Superintendent Davis testified that on the afternoon of November 8, in Respondent's conference room, he personally informed Guzman about his discharge. When asked if anyone was present besides himself and Guzman, Davis testified "I believe probably Luc to translate [referring to Luz Zavalza, Personnel Manager Hood's assistant]." Davis further testified he gave the following explanation to Guzman for his discharge:

I told him that he was being discharged for willfully overbuffing and destroying company property by overbuffing skins. Excessive waste of product I think was the actual term I used.

Davis testified he then handed Guzman his final paycheck and Guzman did not respond or say anything in his defense.

Guzman testified he returned to Respondent's premises on November 9, shortly before 7 a.m. to go to work, and that Hernandez took him to Davis and, with Hernandez acting as an interpreter,³⁵ Davis told Guzman he had overbuffed 20 skins on November 7. Guzman testified he replied by telling Davis he had only overbuffed 14 skins and Davis answered by stating that the number was unimportant, that Guzman had overbuffed too many and that because of this Respondent did not want him in its employ anymore. Guzman testified he then asked if Davis could transfer him to another job rather than discharge him and that Davis told him it was not possible to transfer "people like him" and told him to return for his final paycheck later at 8 a.m., which Guzman did.

Davis testified he notified Nunez about his discharge on November 9 in an office adjacent to Respondent's conference room and, in response to a leading question, testified that Luz Zavalza was present to translate. Davis was not asked whether anyone else was present and did not testify that the only persons present were himself, Zavalza, and Nunez. Davis testified he told Nunez "essentially the same thing" as he had told Guzman, namely, "that he was being discharged for generating excessive waste of product" and that Nunez responded by arguing Respondent expected too much production. Davis testified he then told Nunez that "nobody was disciplining him for the number of skins he was doing" but stated Nunez was being discharged "strictly and simply" for "overbuffing the skins" and gave him his final paycheck.

Nunez testified that on November 8 Luz Zavalza telephoned him and told him to come to Respondent's office at

3:30 p.m. that day. He testified that when he arrived at Respondent's office that Davis spoke to him in English and Zavalza translated and Hernandez was present also during this interview.³⁶ Nunez further testified that Davis told him he was discharged because he had overbuffed 21 skins and Respondent could not employ anyone who worked that poorly because Respondent could go broke if it employed such persons. Nunez testified he protested that he had only overbuffed 14 skins and asked Davis to give him another chance and when Davis refused to give him another chance, Nunez told him that other persons had overbuffed skins and had not been discharged and Davis stated he did not want to talk about other people, that he was just speaking about Nunez.

As described supra, one of the significant things about Davis' testimony concerning his discharge interviews with Guzman and Nunez is that Davis did not inform either of them that the reason they were being discharged was for having willfully or intentionally overbuffed skins, nor did he use words to that effect. According to Davis, he simply repeated to them the explanation for their discharges which had been set forth in the "Personnel Change Orders" placed in their personnel files; he told them they were being discharged for "generating excessive waste of product." I recognize that at one point Davis testified he told Guzman he was "discharged for willfully overbuffing and destroying company property," but in the same breath Davis changed that testimony by testifying that the "actual words" he used was "excessive waste of product" and subsequently, in describing the actual words he used to explain Nunez' discharge, testified he told Nunez essentially the same thing as he had told Guzman, namely, "that he was being discharged for generating excessive waste of product." In any event, I do not credit Davis' description of his discharge interviews with Guzman or Nunez, rather I credit Nunez' and Guzman's account of those interviews because their testimonial demeanor was better than Davis', whose testimonial demeanor was poor when he testified about the interviews. I have considered that I discredited Guzman's testimony regarding his November 7 conversation with Davis and have considered that Guzman lied to the Employment Development Department for the State of California when, in filing his unemployment compensation claim, he stated he had been laid off for lack of work, rather than discharged. Nonetheless, based upon my observation of the witnesses' demeanor I am persuaded that Guzman was the more credible witness concerning what occurred when he was notified by Davis about his discharge.

(h) *Davis informs Potter about Nunez' and Guzman's discharge*

William Potter is a vice president of Respondent and president of its Sawyer Tanning Company Division, the division which operates the facility involved in this case. President Potter exercises overall responsibility for the facility's operation and Plant Superintendent Davis reports directly to him.

In November Potter was absent on business from the facility until the week of November 21. When he returned he met with Davis during the week of November 21 and was brought up to date on what had occurred while he was away.

³⁵ Hernandez did not deny he acted as Davis' interpreter during Davis' discharge interview with Guzman. He was not questioned about this subject.

³⁶ Hernandez did not deny he was present during this interview. He was not questioned about this matter.

Davis and Potter testified that one of the matters mentioned by Davis to Potter was Guzman's and Nunez' discharges. Their testimony concerning Davis' remarks to Potter about Nunez' and Guzman's discharges is set forth and evaluated in this section.

Davis testified he told Potter "we discharged Nunez and Guzman because they were in my opinion intentionally overbuffing skins." In the case of Nunez' discharge, Davis testified he explained to Potter that Foreman Ochoa had talked to Nunez about Nunez' overbuffing, that Nunez had not cooperated, but instead acted very belligerent and told Ochoa that he (Nunez) was not a machine, and that in Davis' opinion "[Nunez'] actions were intentional." In the case of Guzman's discharge, Davis testified he explained to Potter that Guzman was unable to explain or defend his overbuffing and supervision had talked the matter over and decided his actions, like Nunez', were also "intentional."

Potter testified Davis told him Nunez had overbuffed a large number of skins within a short period of time, that the number of skins overbuffed constituted a high percentage of Nunez' work, that Nunez had been uncooperative with his supervisors to the point of abusing them with foul language when questioned about his overbuffing, and told Potter "that under the circumstances [referring to the aforesaid circumstances described to Potter] he [Nunez] had been terminated." In the case of Guzman's discharge, Potter testified Davis reminded him Guzman was one of Respondent's best buffers, who had trained other buffers, but told him Guzman had overbuffed a large number of skins in a fairly short period of time and had not pointed to any problems with the skins which would have caused him to have overbuffed them. Potter further testified that Davis told him he had been told that Guzman was seeking a reassignment to another job and that Davis had decided Guzman had overbuffed the skins deliberately in order to be reassigned to another job and had reached this decision because Guzman was so highly skilled and had trained all of the other buffers and could offer no explanation for overbuffing so many skins.

I have no doubt that at some point in time Potter met with Davis and that Davis explained to him the reason or reasons why Guzman and Nunez were discharged. I am persuaded, however, that their above-described testimony concerning such a meeting is not credible. Initially, I note that their testimonial demeanor was poor when they testified about their November conversation concerning Guzman's and Nunez' discharges. In addition, their testimony was not mutually corroborative in certain significant respects. Potter did not corroborate Davis' testimony that Davis explained to Potter that Davis had decided that Nunez' overbuffing had been done intentionally or that Nunez had been discharged for intentionally overbuffing the skins. And when a comparison is made of their testimony concerning Davis' remarks to Potter about Guzman's discharge, it is apparent that Potter either greatly embellished the conversation by adding numerous details which Davis failed to include in his testimony, or Davis had a lapse of memory when he testified about that part of the conversation. In view of Davis' and Potter's poor testimonial demeanor when they testified about this conversation, I am of the view that the discrepancy between their testimony was not the product of merely a lapse of memory, but was a product of an effort by Davis and Potter to bolster Re-

spondent's case and warrants the inference that Potter's and Davis' account of the meeting was not reliable. Moreover, I find it inherently incredible that Davis, in explaining to Potter the reason for Nunez' and Guzman's discharges, would have told Potter they were discharged for intentionally overbuffing skins when during this same period of time Davis did not give this as the reason for their discharges when he documented the reason for their discharges for Respondent's personnel files or when he explained the reason for their discharges to the other buffers in Respondent's employ. Nor did Respondent give this as a reason when on November 14 it explained its reason for discharging Nunez and Guzman to the Employment Development Department for the State of California in contesting Nunez' and Guzman's claims for unemployment compensation. It is for all of these reasons that I find Potter's and Davis' testimony concerning their November discussions of Nunez' and Guzman's discharges was unreliable and untrustworthy. I therefore reject it in its entirety.

(i) Respondent's treatment of experienced buffers who overbuffed too many skins

During Plant Superintendent Davis' several years as superintendent, Guzman and Nunez have been the only buffers discharged for reasons related to work performance. The reason why Davis has discharged so few buffers for work performance related reasons is that the position of a buffer is a very demanding one and is a very difficult one to fill, so once someone has been trained as a buffer Davis bends over backwards to retain that person as a buffer. If, however, an experienced buffer performs poorly and continues to perform poorly after being warned or otherwise disciplined, then Davis transfers that buffer to a less-demanding and lower paying job. Likewise, if during a buffer's initial 6- to 12-week training period, the buffer by virtue of poor work performance indicates he has no aptitude for the job, he will be transferred to a less-demanding and lower paying job. The record also reveals that if experienced buffers become unhappy with buffing and their work performances become unsatisfactory and they request a transfer to a less-demanding job, that their transfer will usually be granted.

I have set forth below Respondent's treatment of several experienced buffers, whose work performance was unsatisfactory and whose treatment by Davis the General Counsel contends is relevant to an evaluation of Respondent's motive for discharging Nunez and Guzman.

(1) Alejandro Gonzalez

As noted *supra*, during the early part of November, Alejandro Gonzalez was one of the buffers employed in Respondent's skin finishing department. He had been employed by Respondent since 1977 and for at least the past 7 years had been employed as a buffer in the skin finishing department. On August 22 Skin Finishing Department Supervisor Hernandez verbally warned Gonzalez about overbuffing too many skins and told him he would be issued a written warning if it happened again. In approximately 2 weeks, on September 7, Gonzalez overbuffed 34 of the 142 skins he buffed

that day, for 23.94 percent of overbuffs. He was not warned or otherwise disciplined because of this.³⁷

On September 30 Gonzalez overbuffed 10 of the 210 skins he buffed that day, for 4.76 percent of overbuffs. He was not warned or otherwise disciplined because of this.

On October 4 Gonzalez overbuffed 11 of the 186 skins he buffed that day, for 5.91 percent of overbuffs. As a result of this he received a verbal warning from Supervisor Hernandez for overbuffing too many skins.

On October 27 Gonzalez overbuffed 4 of the 82 skins he buffed that day, for 4.88 percent of overbuffs. Then on November 1 he overbuffed 11 of the 152 skins he buffed that day, for 7.24 percent of overbuffs. On November 1 Plant Superintendent Davis spoke to Gonzalez about his overbuffing and following their conversation wrote the following memo addressed to him which he placed in his personnel file:³⁸

I have warned Alejandro Gonzalez that if the over buffing problem continues he will be facing disciplinary action, such as suspension [sic], re-assignment, etc. [Gonzalez] said he was doing the best he could and thought the skins were bad but I told him:

1) As experienced as he is he should not damage that many skins, he should stop, show the skins that he thinks are a problem to his Foreman, use much less pressure [sic], or finer grit.

2) The buffer get a run of skins mixed from all the men wheelsteking, and all the buffers are not having the same problems. So it has to be something he is doing.*

*It is common for a man to have 2 or 3 skins during the day more than that is excessive.

On Friday, November 4, Gonzalez overbuffed 16 of the 106 skins he buffed that day, for 15.09-percent overbuffs. As a result at the end of the workday Hernandez went to Davis and complained about the continuing problem he was having with Gonzalez' overbuffing. The next workday, Monday, November 7, when Gonzalez reported for work, he was informed by Davis "that because of repeated overbuffing problems causing damage to the skins he was suspended 5 days without pay and will be reassigned to a lower rated job when he returns to work Monday 11/14/88." Gonzalez responded by handing Davis a note from his physician which was dated November 5 and which stated in substance that for health reasons Gonzalez should be transferred from his position as a buffer to a position in the Company's toggling department.

On November 14, when his 5-day suspension ended, Gonzalez was reassigned to a lower paying job in the toggling department.

Late in November Respondent's personnel department commenced to investigate Gonzalez' illness.³⁹ In January 1989 by virtue of this investigation Respondent learned that Gonzalez was suffering from hypertension and other health

problems which caused chest pains and dizziness and had been coming to work since November 1 against the advice of his physicians. In view of this, Respondent in January 1989 rescinded Gonzalez' suspension and reimbursed him for the wages lost as the result of the suspension.

(2) Alfredo Martinez

Alfredo Martinez has been employed by Respondent since 1976 and during his employment was employed as a buffer in the skin finishing department for approximately 2 years from approximately May 1986 to mid-May 1988. On May 17 he was transferred to a job in the toggling department under the following circumstances.

As noted supra, prior to 1988 the buffers buffed the sheep skins only once, but early in 1988 they began to buff the skins two times as part of Respondent's new process designed to improve the quality of its product. Subsequent to the introduction of the two-step buffing process Martinez began having problems with his work and was informed by the department's supervisor that he was doing his job poorly and warned if his work did not improve he would be fired. Thereafter, in the middle of May, Martinez overbuffed approximately 20 skins one day and was issued a written disciplinary warning by the supervisor on account of this. Immediately after being issued this warning, Martinez was spoken to by Plant Superintendent Davis who told him he was burning too many skins. Martinez told Davis he was not happy working as a buffer and asked for a transfer to another job. Davis responded by stating he realized Martinez was not able to meet the increased quality standards recently instituted in the department and agreed to transfer him to another job in the toggling department.⁴⁰

The "Personnel Action Card" made out by Respondent for Martinez' transfer is dated May 17 and states he was reassigned to the position of wringer in the toggling department with a reduction in pay and explains his transfer in these terms: "Due to poor work performance the employee being reclassified." Attached to the "Personnel Action Card" is a written disciplinary warning dated May 17 which was signed by Davis and stated that Martinez,

is reassigned to wringing second shift dye shop due to problems with his work performance while buffing. He had been unable to adjust to the improved quality standards. He has been counseled to adjust to the improved quality standards. I told him that if there were problems with his work performance in the new job. [sic] disciplinary action, suspension or discharge will be taken.

(3) Miguel Alvarez

Miguel Alvarez began work for Respondent in March and since May has been employed as a buffer in the skin finishing department. On October 4 Department Supervisor Hernandez verbally warned him for overbuffing skins. Thereafter, on November 2, after Alvarez overbuffed five skins the previous day, Hernandez told him he intended to issue Alva-

³⁷ Based upon the lack of any documentation in Gonzalez' personnel file indicating he was warned or disciplined and the failure of either Hernandez or Davis to testify that he was either disciplined or warned.

³⁸ Davis did not give a copy of this memo to Gonzalez. I note that Gonzalez did not testify in this proceeding.

³⁹ The investigation was carried out pursuant to the request of Respondent's vice president, William Potter, who as president of Respondent's tannery division is in charge of the Napa facility's overall operation. Potter had been out of town from the first part of November until the latter part of November.

⁴⁰ Davis testified Martinez was transferred because the quality of his work as a buffer was unsatisfactory and he had requested to be transferred. Then in response to a leading question he further testified that another consideration in deciding to transfer Martinez was his seniority with Respondent.

rez a written disciplinary warning for overbuffing. Alvarez pleaded with him not to do this and Hernandez instead of issuing a written warning simply told Alvarez to buff more carefully.⁴¹ However, Hernandez placed in Alvarez' personnel file a memo dated November 2 which stated Hernandez had "verbally warned Miguel Alvarez about overbuffing skins. He was told that if it doesn't stop, he would be facing a disciplinary action."

On December 5 Alvarez overbuffed 17 out of 178 skins he buffed that day, for a 9.55-percent overbuff. Alvarez testified that the next day Hernandez told him he had overbuffed too many skins the previous day and that Alvarez responded by telling Hernandez he had been trying to be more careful and that most of the time he did not overbuff skins and had only overbuffed so many skins on two other occasions. Hernandez, as Alvarez testified, stated he would not discipline Alvarez this time but that if Alvarez continued to overbuff skins he would be suspended for 1 week. Alvarez further testified that the skins he was given to buff on December 5 were not "problem" skins and that the reason he overbuffed 17 skins that day was that "sometimes . . . you just have bad days." It is undisputed that on December 6 Hernandez signed a memo which he placed in Alvarez' personnel file which stated: "Alvarez was told that if he did not improve work performance and did not stop damaging skins he would be laid off for 5 days without pay."

Hernandez testified that on December 5 he spoke to Alvarez about overbuffing skins and told him to be more careful with the skins. He also testified that on December 5 "we [referring to Hernandez and Alvarez] worked together on that problem. We noticed . . . he was handling some bad skins," and that Hernandez told Alvarez "he was having some bacterial problems with the skins . . . but on the other parts of the skin that he'd have to be a little more careful." Hernandez further testified that later during the day, after lunch, he again spoke to Alvarez about his overbuffing and told him if he did not stop overbuffing skins he would be given a disciplinary layoff. Hernandez failed to explain why, if Alvarez' overbuffing was caused by the poor quality of the skins, he threatened him with a disciplinary layoff for overbuffing. Indeed, when initially asked why he threatened Alvarez with a disciplinary layoff, Hernandez testified he did not know. He then testified that his reason for threatening Alvarez was to give him an incentive to buff more carefully, but admitted he had observed that Alvarez in fact was trying to buff carefully. Subsequently, Hernandez testified that if an experienced buffer, such as Alvarez, was given poor skins to buff, this did not give the buffer an excuse to overbuff the skins because, as Hernandez testified, even if the quality of the skins was bad, "if [the buffers] want to stop [overbuffing] and they are experienced, they know how to stop [overbuffing]." But when it was pointed out to him that he had in effect testified that one of the reasons Alvarez had not been disciplined for overbuffing 17 skins on December 5 was that the skins had been damaged by bacteria, Hernandez changed his testimony; he now testified that whether or not an experienced buffer, such as Alvarez, would be disciplined would depend on the quality of the skins and not the experience of the buffer because even an experienced buffer "might" overbuff poor quality skins.

⁴¹ Based upon Alvarez' undenied testimony.

I do not credit Hernandez' testimony that the quality of the skins buffed by Alvarez on December 5 was poor or that all or some of the skins had been damaged by bacteria. Hernandez' testimonial demeanor was poor and, as described supra, his testimony on significant matters was contradictory or appeared to be incredible. Especially incredible is that Hernandez wrote a note to Alvarez' personnel file stating that "Alvarez was told that if he did not improve his work performance and did not stop damaging skins he would be laid off for 5 days without pay," yet supposedly believed that Alvarez' overbuffing of skins was caused in substantial part by the poor quality of the skins he had been given to buff. It is for all of these reasons that I reject Hernandez' testimony.⁴² In doing so I considered that Plant Superintendent Davis testified during direct examination that he "believed" Hernandez mentioned to him that some of the skins which Alvarez had overbuffed on December 5 had been damaged by bacteria and that this condition may have been a cause of his overbuffing. However, when Davis gave this testimony he was hesitant and his testimonial demeanor was poor. Also Hernandez failed to corroborate Davis' testimony that Hernandez spoke to Davis about this matter or told Davis that the quality of Alvarez' skins was poor. I also note that when, during his cross-examination, Davis was questioned about his conversation with Hernandez concerning this matter, that Davis significantly omitted to mention Hernandez said anything to him about the quality of the skins buffed by Alvarez, rather he simply testified that Hernandez "told me he had a problem with overbuffing, that he'd counseled [Alvarez], that he'd talked to [Alvarez], [Alvarez] was making an effort to correct the situation, and he thought he had the problem under control."

(4) Nabor Camarena

Nabor Camarena was employed as a buffer for several months in 1987 and reassigned to that position in January and on April 25 was transferred to another job with a reduction in pay, under these circumstances.

On March 9 Davis issued a written warning to Camarena stating, "if he did not start getting more skins done with good quality [that] disciplinary action; suspension, reassignment, or discharge will result." Subsequently he was reassigned on April 24 to another job with a lower rate of pay. The "Notice of Personnel Action" placed in his personnel file explains the reassignment in these terms: "Employee is being reassigned as a disciplinary action due to poor work performance after numerous warning notices." Attached to this notice was a memo from buffing Supervisor Hernandez dated April 28 which stated Camarena "is being given a disciplinary reassignment . . . because of problems with reworks and productivity in the buffing area." Davis testified that Camarena was reassigned to another job because he was

⁴² I considered that Alvarez, during cross-examination, when asked "if there was a problem with the quality of the skins on [December 5]," testified, "I don't remember exactly." Nonetheless for the reasons set forth previously, I reject Hernandez' testimony and credit Alvarez' testimony that the skins he was given on December 5 were not "problem" skins. I also credit his testimony that when he explained to Hernandez why he had overbuffed so many skins, he did not word his explanation in terms of the poor quality of the skins, and credit his testimony that his reason for overbuffing so many skins on December 5 was that he just had a bad day. In so testifying, Alvarez, whose testimonial demeanor was good impressed me as a sincere and conscientious witness.

unable to meet the Company's production and quality standards under the newly instituted two-stage buffing system.

(5) Raul Baldaras, Juan Mesa, and Faustino Perez

On January 23, 1989, Supervisor Hernandez verbally warned buffers Raul Baldaras and Juan Mesa for overbuffing 10 and 13 skins, respectively.

On November 2 Faustino Perez overbuffed 6 skins for a 4.11-percent overbuff and on November 28 again overbuffed 6 skins for a 6-percent overbuff. On neither occasion did he receive a warning.

(j) *Respondent's reasons for discharging Nunez and Guzman*

Plant Superintendent Davis testified it was he who made the decision to discharge Nunez and Guzman and testified in effect that his decision was not based upon the fact that they had overbuffed a large number of skins on November 7, but that his decision was based upon his belief that they had "intentionally overbuffed the skins, plain and simple" and testified that this was "the only reason," that there was "no other reason" for why they had been discharged (Tr. 542-543). Davis testified that both Guzman and Nunez would still be employed by Respondent if Davis had not concluded that they had overbuffed the skins intentionally. Davis also testified that the warnings issued to Nunez and Guzman prior to November 7 had nothing to do with his decision to discharge them.

Davis testified in effect that in concluding Nunez and Guzman had intentionally overbuffed the skins on November 7 that he relied on the following circumstances: the lack of an apparent reason for so many skins to have been overbuffed inasmuch as there was nothing wrong with the skins which Nunez and Guzman had been given to buff; Nunez and Guzman were experienced buffers whose quality of work had previously been good; Guzman and Nunez failed to offer any explanation for having so many overbuffs; and, Nunez had been uncooperative when supervision spoke to him about the problem.

2. Discussion

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404-405 (1983), the Supreme Court approved the Board's procedural framework, first set forth in *Wright Line*, 251 NLRB 1083 (1980), for resolving the question of motivation in alleged unlawful discrimination cases. Under this analysis, an unfair labor practice is established if the General Counsel shows that an employee's protected conduct was "a motivating factor" in the employer's decision to take adverse action against him, unless the employer can demonstrate, as an affirmative defense, that it would have taken this action even absent the employee's protected conduct. *NLRB v. Transportation Management Corp.*, 462 U.S. at 395. Of course, where the inference of unlawful motivation is based in part on proof that the employer's proffered lawful reason is a mere pretext to disguise discrimination, the inquiry is logically at an end. As the Board explained in *Wright Line*, 251 NLRB at 1084, where it has been shown that the claimed lawful reason advanced by the employer either did not exist or was not in fact relied on, there is no remaining predicate for any determination that the adverse action would

have taken place even in the absence of the employee's union activity. See also *Postal Service*, 275 NLRB 510 (1985); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd. 705 F.2d 799 (6th Cir. 1982); *Republic Die & Tool Co. v. NLRB*, 680 F.2d 463, 465 (6th Cir. 1982); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 63-64 (2d Cir. 1982). For the reasons set forth below, I find the General Counsel has established that "a motivating factor" in the Respondent's decision to discharge employees Nunez and Guzman was their union sympathies and activities and that Respondent failed to establish they would have been discharged even absent their union sympathies and activities.

The timing of the discharges supports an inference of antiunion motivation. As described in detail supra, on October 21 Respondent learned the Union was attempting to organize its production and maintenance employees and on November 4, by virtue of the Union's letter, learned that Guzman and Nunez were among the employees who supported the Union's organizational campaign and on that same day observed Guzman and Nunez wearing union photo identification badges and union buttons while at work. Respondent discharged Guzman and Nunez only 2 working days after it learned of their union sympathies and activities. Such a coincidence in time between Respondent's knowledge of Guzman's and Nunez' union sympathies and activities and their discharges is strong evidence of an unlawful motive for their discharges. *NLRB v. Rain Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision); *NLRB v. Windsor Industries.*, 730 F.2d 860, 864 (2d Cir. 1984); *Dayton Typographic Service*, 778 F.2d 1188, 1193 (6th Cir. 1985).

Another factor which supports an inference of unlawful motivation is that when it discharged Guzman and Nunez for overbuffing too many skins, Respondent treated them differently than other experienced buffers who overbuffed a comparable number of skins. As described in detail supra, when Respondent explained the reason for their discharges to Guzman and Nunez, and to the other buffers, and to the Employment Development Department for the State of California, and when it documented the reason for its personnel records, Respondent stated in substance that Guzman and Nunez had been discharged because on November 7 they overbuffed too many skins. As I have found supra, on November 7 Guzman and Nunez each overbuffed approximately 22 or 23 skins. They were, however, the first buffers ever discharged for overbuffing skins or discharged for a work-related reason during Plant Superintendent Davis' several years as plant superintendent. This despite the fact, as described in detail supra, that other buffers have had bad days during which they overbuffed a comparable number of skins as were overbuffed November 7 by Guzman and Nunez: One day early in September, Alejandro Gonzalez overbuffed 34 skins; one day in the middle of May, Alfredo Martinez overbuffed approximately 20 skins; and, one day early in December, Miguel Alvarez overbuffed 17 skins. Prior to the day he overbuffed 34 skins, Gonzalez had received a verbal warning from Supervisor Hernandez for overbuffing too many skins and been threatened with a written disciplinary warning if it happened again. Yet, he was not warned nor disciplined when he later overbuffed 34 skins in early September, and when, subsequently on October 4 and November

1, he again overbuffed too many skins, he received only verbal warnings. Martinez, in early 1988, was notified by Supervisor Hernandez that his work performance was poor and warned by Hernandez if his work performance did not improve he would be discharged. Yet, when he later overbuffed approximately 20 skins one day in the middle of May, he was only issued a written disciplinary warning by Hernandez and counseled about his overbuffing by Plant Superintendent Davis. Moreover, when, during his conversation with Davis, Martinez stated he was not happy working as a buffer and wanted to be transferred to another job, Davis responded by transferring him to another job, albeit a lower paying one. Alvarez, on October 4 and November 2, was verbally warned by Supervisor Hernandez for overbuffing too many skins and Hernandez placed a memo in his personnel file stating Alvarez would be disciplined if he did not stop overbuffing skins. Yet, when Alvarez later overbuffed 17 skins on December 5, he was not disciplined; he was only warned by Hernandez that he would receive a 1-week suspension if he continued to overbuff skins. Although Gonzalez, Martinez, and Alvarez, like Guzman and Nunez, were all experienced buffers, Respondent held Guzman and Nunez in much higher esteem. Thus, Davis testified that prior to November 7 the quality of Guzman's work had been "very good" and that he was one of the Company's best buffers, and further testified that Nunez was a "good" buffer and that prior to November 7 Davis had no real problem with the quality of Nunez' work. Indeed, during their employment as buffers Guzman and Nunez received only one warning each for overbuffing skins. In view of the foregoing circumstances, it is clear that when Respondent discharged Guzman and Nunez, it treated them differently from Gonzalez, Martinez, and Alvarez, and that this disparate treatment warrants an inference that Guzman's and Nunez' discharges were discriminatorily motivated.⁴³

Also relevant in evaluating Respondent's motivation for discharging Nunez and Guzman is the fact Respondent was unable to settle on a reason for the discharges. Contemporaneously with the discharges, when Respondent explained the reason for the discharges to Guzman and Nunez and to the other buffers in its employ, and when it documented the reason for its personnel records, Respondent stated in substance that Guzman and Nunez had been discharged because on November 7 they overbuffed an excessive number of skins. However, in later contesting Guzman's and Nunez' unemployment compensation claims, Respondent embellished considerably upon this reason; it informed the Employment Development Department for the State of California that while the excessive number of skins overbuffed on November 7 by

Guzman and Nunez triggered their discharges, that the reason for the discharges was that each had been warned several times previously about overbuffing skins and that since Respondent could not tolerate their continual ruining of its product any longer, it had decided to discharge them for "excessive waste of our product." This explanation was patently false inasmuch as Respondent, as described supra, admits that prior to November 7 it had no problem with the quality of the work performed by either Guzman or Nunez, and admits that Guzman had been regarded as one of the Company's best buffers and Nunez had been regarded as a "good" buffer. Indeed at the hearing in this case, Plant Superintendent Davis admitted that the isolated warnings issued to Guzman and Nunez, prior to November 7, had absolutely nothing whatsoever to do with the decision to discharge them. Davis further testified that the fact that they overbuffed an excessive number of skins on November 7 had nothing whatsoever to do with their discharges; he testified that the only reason for their discharges was his belief that when they overbuffed the skins on November 7 that they had done so intentionally. This explanation for the discharges was expressed by Respondent for the first time only when it was confronted with the unfair labor practice charges filed in his case and was first expressed by its labor relations consultant in Respondent's statement of position submitted to the Board's Regional Director in response to those charges. In other words, as I have found supra, the record reveals Respondent proffered several different and shifting reasons, one of which was admittedly patently false, to justify Guzman's and Nunez' discharges. These circumstances lend strong support to the inference that the only reason for the discharges was Guzman's and Nunez' union sympathies and activities. For, "an unfavorable inference may be drawn against the company for its inability to settle upon an explanation for the discharge. This failure 'in itself lends support to the theory that [the employees'] union support was the real explanation.'" *NLRB v. Teknor Apex Co.*, 468 F.2d 692, 694 (1st Cir. 1972), quoting, *A. J. Krajewski Mfg. Co. v. NLRB*, 413 F.2d 673, 676 (1st Cir. 1969); see also *NLRB v. Georgia Rug Mill*, 308 F.2d 89, 91 (5th Cir. 1956); and *NLRB v. Superior Sales*, 366 F.2d 229, 234-235 (8th Cir. 1966).

Lastly, the inference of unlawful motivation for Guzman's and Nunez' discharges is further supported by the pretextual nature of Respondent's claim that it discharged them because the skins they overbuffed on November 7 were overbuffed intentionally. In this regard, Plant Superintendent Davis testified he was the person who decided to discharge Guzman and Nunez and that he did not decide to discharge them because they had overbuffed an excessive number of skins, but his decision was based on his belief that they had "intentionally overbuffed the skins, plain and simple," and further testified this was "the only reason" and there was "no other reason" for their discharges (Tr. 542-543). However, contemporaneously with the discharges, as I have described in detail supra, when Davis explained the reason for the discharges to Guzman and Nunez and to the other buffers in Respondent's employ and documented the reason in Respondent's personnel records, Davis did not state, either expressly or by implication that Guzman or Nunez had been discharged because they intentionally overbuffed skins. Rather, he stated in substance that they had been discharged for

⁴³ I have considered that, as set forth in detail supra, the person who decided to discharge Guzman and Nunez, Plant Superintendent Davis, testified his decision was not based upon the fact that they overbuffed an extraordinarily large number of skins on November 7, but on his belief that they overbuffed the skins intentionally, thus distinguishing their situation from the situation of those buffers who overbuffed an excessive number of skins and were not discharged or otherwise disciplined. As described infra, Davis' explanation for the discharges of Guzman and Nunez was advanced by Respondent for the first time only when it was confronted with the unfair labor practice charges in this case and was first expressed by Respondent's labor relations consultant in Respondent's statement of position submitted to the Board's Regional Director in response to those unfair labor practice charges. As I have found infra, this explanation was an afterthought which was fabricated by Respondent when it realized that the reason it initially advanced to justify the discharges, the reason it gave Guzman and Nunez and placed in their personnel records and offered to all interested third parties, would not withstand close scrutiny.

overbuffing an excessive number of skins.⁴⁴ Likewise, when Personnel Manager Hood, who was involved with Davis in making the decision to discharge Guzman and Nunez, contested Guzman's and Nunez' unemployment compensation claims, she did not state either expressly or by implication that they had been discharged because they intentionally overbuffed skins. Rather she informed the Employment Development Department for the State of California that they had been discharged for overbuffing an excessive number of skins on November 7 and because they engaged in this conduct despite the fact that they each had been warned several times previously for overbuffing skins and that since Respondent could not tolerate their continual ruining of its product any longer, it had decided to discharge them for "excessive waste of our product." Respondent's belated contention that Guzman and Nunez overbuffed the skins intentionally was first expressed by Respondent only after it was confronted with the unfair labor practice charges filed in this case and was first expressed by Respondent's labor relations consultant in Respondent's statement of position submitted to the Board's Regional Director in response to those charges. If Respondent had discharged Guzman and Nunez because it believed they overbuffed the skins intentionally on November 7, it is incredible that Respondent would have waited until being confronted with the unfair labor practice charges before advancing that as the reason for their discharges. I find it inconceivable that if Respondent discharged Guzman and Nunez because it believed they overbuffed the skins intentionally on November 7, that Respondent did not say this to either Guzman or Nunez when it explained to them the reason why they were discharged, or did not say this in its personnel records, or did not say this to its other buffers when they asked why Guzman and Nunez had been discharged, or did not say this to the Employment Development Department for the State of California when Respondent contested Guzman's and Nunez' unemployment compensation claims. It is for these reasons and because of Davis' poor testimonial demeanor when he testified that his decision to discharge Guzman and Nunez was based on his belief that they had overbuffed the skins on November 7 intentionally, that I find Respondent's claim that Nunez and Guzman were discharged because they overbuffed skins intentionally was an afterthought which was fabricated by Respondent when it realized that the reason it had initially advanced to justify the discharges would not withstand close scrutiny.⁴⁵ In other

words, I find Respondent's claim that Nunez and Guzman were discharged because they overbuffed skins intentionally is a pretext, which lends further support to the inference that the real reason for their discharges was their union sympathies and activities. For, the law is settled that if the proffered reason for a discharge is false, one may infer that there is another reason (an unlawful reason) for the discharge that the employer wishes to hide, where, as in the instant case, the surrounding facts tend to reinforce that inference. *Wright Line*, supra at 1088 fn. 12; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); see also *Postal Service*, 275 NLRB 510 (1985).

Considering the timing of Guzman's and Nunez' discharges, coming as they did hard on the heels of Respondent's knowledge of their union sympathies and activities; considering Respondent treated them differently than other experienced buffers who overbuffed an excessive number of skins; considering Respondent's inability to settle on a reason to justify their discharges; and, considering the pretextual nature of the reason Respondent belatedly advanced in this proceeding to justify the discharges; I find the General Counsel has established that a motivating factor in Respondent's decision to discharge Guzman and Nunez was their union sympathies and activities.⁴⁶ The General Counsel therefore has presented a prima facie case that Guzman and Nunez were discharged because of their union sympathies and activities. Under *Wright Line*, Respondent must show that it would have discharged these employees anyway, absent their union sympathies and activities. Since I have found, supra, that the proffered reason for the discharges was a pretext, I conclude that the Respondent has not met its *Wright Line* burden. Therefore, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Salvador Guzman on November 9 and Francisco Nunez on November 8 because of their union sympathies and activities.

The complaint does not allege that Respondent's November 7 decision to suspend Guzman and Nunez violated the Act, it only alleges that their subsequent discharges violated the Act. The record reveals, however, that their suspensions and subsequent discharges are factually and legally intertwined, thus giving Respondent ample notice that the legality of its motivation in suspending Guzman and Nunez would be an issue in this proceeding. It is not surprising therefore, that the issue of Respondent's motivation in suspending Guzman and Nunez was fully litigated by the parties. It is for these reasons that I have considered the legality of Respondent's November 7 decision to suspend, prior to discharging,

⁴⁴The nearest Davis came to saying that he believed either Guzman or Nunez intentionally overbuffed skins was when, on November 7, in suspending Guzman he told Guzman that short of taking a razor blade and cutting or stealing the skins, overbuffing was the worst thing a buffer could do to the skins. However, the record reveals that when Davis stated this, that he was not implying that Guzman acting intentionally; rather he was implying Guzman had been "careless." Thus, Davis testified that the reason he decided on November 7 to suspend Guzman, rather than discharge him was that he had concluded that Guzman had acted "carelessly," not intentionally, in overbuffing the skins.

⁴⁵I have considered Respondent's contention that the record herein contains several objective considerations, in existence during the time material, which could have led Davis to reasonably conclude that Nunez and Guzman had overbuffed the skins on November 7 intentionally. However, whether Davis could have reasonably concluded that Guzman and Nunez on November 7 intentionally overbuffed the skins is beside the point, because I am persuaded, for the reasons set forth above, that Davis' testimony that he discharged Guzman and Nunez because he believed they intentionally overbuffed the skins was an afterthought designed to mask Respondent's real reason for the discharges.

⁴⁶In so concluding I considered the lack of direct evidence that Respondent was antagonistic toward employees who favored union representation and the failure of the General Counsel to allege that Respondent discharged or disciplined any of the other employees whose union sympathies and activities the Respondent was aware of. Regarding the lack of direct evidence of union animus, the law is settled that even without direct evidence of union animus, the Board, in proper circumstances may infer animus. E.g., *Stoffel Seals Corp.*, 199 NLRB 1084 (1972); *NLRB v. Ri-Dell Tool Mfg. Co.*, 486 F.2d 1406, 1407 (7th Cir. 1973); and *NLRB v. Warren L. Rose Casting*, 587 F.2d 1005, 1007 (9th Cir. 1978). Here, for the reasons set forth above, the circumstances warrant an inference of antiunion animus. Regarding the General Counsel's failure to allege that other known union adherents have been discharged or disciplined because of their union sympathies and activities, it is settled that an employer's discriminatory motive is not disproved by evidence showing "that it did not weed out all union adherents." *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). Accord: *NLRB v. Challenge-Cook Bros. of Ohio*, 374 F.2d 147, 152 (6th Cir. 1967); *NLRB v. Instrument Corp. of America*, 714 F.2d 324, 330 (4th Cir. 1983).

Guzman and Nunez. For the reasons below, I find that on November 7 Respondent suspended them because of their union sympathies and activities, thereby violating Section 8(a)(3) and (1) of the Act.

As described supra, on November 7 Plant Superintendent Davis decided to suspend Guzman and Nunez and informed Guzman of this decision prior to the end of Guzman's workshift on November 7 and informed Nunez on November 8 when Nunez came to work. Subsequently, on November 8, as I have found supra, Respondent decided to discharge Guzman and Nunez because of their union sympathies and activities.

Davis testified he decided on November 7 to suspend Guzman because, after inspecting the skins Guzman had overbuffed that day, Davis concluded Guzman had acted carelessly in overbuffing so many skins and decided that because of this carelessness he would suspend him and at that time also decided that after the period of suspension ended he would then discipline Guzman further by reassigning him to a lower paying job. In the case of Nunez' suspension, Davis testified that after inspecting the skins Nunez overbuffed on November 7 and after considering the matter, Davis concluded Nunez had acted willfully and intentionally in overbuffing the skins and for this reason Davis testified he decided to discharge him. Davis further testified that because Guzman and Nunez were experienced workers who had been employed by Respondent for several months that he also decided that before he meted out the above-described discipline, he would discuss the matter with other members of management.

The timing of Davis' decision to suspend Guzman and Nunez, virtually contemporaneously with Respondent's knowledge of their union sympathies and activities, and the fact that the day after it decided to suspend them that Respondent discharged them because of their union sympathies and activities, establishes that a motivating factor for their suspensions was their union sympathies and activities. The General Counsel therefore has presented a prima facie case that Guzman and Nunez were suspended because of their union sympathies and activities. Under *Wright Line*, Respondent must show it would have suspended them anyway, absent their union sympathies and activities. Since I have found supra, that Respondent's proffered reason for Nunez' suspension—the intentional overbuffing of skins—was a pretext, I conclude Respondent has not met its *Wright Line* burden in Nunez' case.

Regarding Respondent's justification for suspending Guzman, his overbuffing of an excessive number of skins on November 7 due to carelessness, Respondent presented no evidence that it has ever suspended an experienced and valued buffer, such as Guzman, who had previously enjoyed an exemplary work record, for one day overbuffing an excessive number of skins. Quite the opposite, the record reveals that in being suspended for overbuffing an excessive number of skins on November 7, Guzman was the victim of disparate treatment. For, as I described in detail supra, Alejandro Gonzalez, Alfredo Martinez, and Miguel Alvarez, buffers not nearly as well regarded by Respondent as Guzman, were not suspended from work when, like Guzman, they overbuffed an extremely large number of skins in a single day. Under the circumstances I find Respondent has not established that

it would have suspended Guzman on November 7 even absent his union sympathies and activities.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Victor Camacho on October 21, 1988, and discharging him on October 24, 1988, because of his protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

4. By suspending Francisco Nunez and Salvador Guzman on November 7, 1988, and discharging Nunez on November 8, 1988, and discharging Guzman on November 9, 1988, because of their union sympathies and activities, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and from any like or related manner infringing upon its employees' Section 7 rights, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated the Act by suspending and discharging Victor Camacho, Francisco Nunez, and Salvador Guzman, I shall recommend that Respondent offer each of them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges. I shall also recommend that the Respondent make Victor Camacho, Francisco Nunez, and Salvador Guzman whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful suspension and discharges, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent remove from its records any reference to the unlawful suspensions and discharges, provide the discriminatees with written notice of the removal, and inform them that the unlawful suspensions and discharges will not be used as a basis for future personnel actions concerning them. See *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁷

ORDER

The Respondent, Sawyer of Napa, Inc., Napa, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging, suspending, or otherwise discriminating against employees because of their union sympathies or union activities.

(b) Discharging, suspending, or otherwise discriminating against employees for striking or engaging otherwise in concerted protected activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Victor Camacho, Francisco Nunez, and Salvador Guzman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful suspensions and discharges of Victor Camacho, Francisco Nunez, and Salvador Guzman, and notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Napa, California facility copies of the attached notice marked "Appendix."⁴⁸ Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you because of your union sympathies or union activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against any of you for striking or engaging otherwise in concerted protected activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Victor Camacho, Francisco Nunez, and Salvador Guzman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful suspensions and discharges of Victor Camacho, Francisco Nunez, and Salvador Guzman, and notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

SAWYER OF NAPA, INC.